

January 19, 2022

1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEE-ANNE WALTERS, et al,

Plaintiffs,

-v-

Case No. 17-10164

CITY OF FLINT, et al,

Defendants.

/

MOTION HEARING

BEFORE THE HONORABLE JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE

JANUARY 19, 2022

APPEARANCES:

For the Corey M. Stern
Plaintiffs: Levy Konigsberg, LLP
605 Third Avenue, Suite 33rd Floor
New York, New York 10158

Moshe Maimon
Levy Konigsberg, LLP
605 Third Avenue, Suite 33rd Floor
New York, New York 10158

Renner Kincaid Walker
Levy Konigsberg, LLP
800 Third Avenue, 11th Floor
New York, New York 10022

(Appearances Continued On Next Page)

**To Obtain a
Certified
Transcript
Contact:** **Jeseca C. Eddington, RDR, RMR, CRR, FCRR
Federal Official Court Reporter
United States District Court
200 East Liberty Street
Ann Arbor, Michigan 48104**

January 19, 2022

2

1 Hunter Shkolnik
2 Napoli Shkolnik
3 270 Munoz Rivera Avenue, Suite 201
4 Hato Rey, Puerto Rico 00918

5 For the James M. Campbell
6 Defendants: Campbell Conroy & O'Neil, P.C.
7 1 Constitution Wharf, Suite 310
8 Boston, Massachusetts 02129

9 Alaina N. Devine
10 Campbell Conroy & O'Neil, P.C.
11 1 Constitution Wharf, Suite 310
12 Boston, Massachusetts 02129

13 Kristin Michele Dupre
14 Campbell Conroy and O'Neil PC
15 1 Constitution Wharf, Suite 310
16 Boston, Massachusetts 02129

17 Mark R. Ter Molen
18 Mayer Brown LLP
19 71 South Wacker Drive
20 Chicago, Illinois 60606

21 Marcus Christian
22 Mayer Brown LLP
23 1999 K Street NW
24 Washington, District of Columbia 20006

25 Minh Nguyen-Dang
Mayer Brown LLP
1999 K Street NW
Washington, District of Columbia 20006

Philip A. Erickson
Plunkett & Cooney
325 E. Grand River Avenue, Suite 250
East Lansing, Michigan 48823

Cheryl A. Bush
Bush, Seyferth PLLC
100 W. Big Beaver Road, Suite 400
Troy, Michigan 48084

S. Vance Wittie
1717 Main, Suite 5400
Dallas, Texas 75201

January 19, 2022

3

1 To Obtain a Certified Transcript Contact:
2 Jeseca C. Eddington, RDR, RMR, CRR, FCRR
3 Federal Official Court Reporter
4 United States District Court
5 200 East Liberty Street - Ann Arbor, Michigan 48104
6
7
8
9
10
11
12
13
14
15

16 I N D E X
17

18 MISCELLANY

19 Proceedings.....4
20 Certificate.....139
21
22
23
24
25

January 19, 2022

4

P R O C E E D I N G S

THE CLERK: Calling the Flint Water Cases.

THE COURT: Well, thank you, all, for being here.

And this is the date and time that was set for an initial hearing on a first group of motions in limine that have been filed by both plaintiffs and both defendants.

And so let me say something about how these were selected. There are well over 25 or something different motions in limine. And I have been chipping away at them, issuing some written decisions on various motions that I didn't have questions for the parties or it appeared that the issue was pretty easy to decide in a quick written opinion. And you've gotten all of those.

What I did next was just pick a handful. So please don't read too much into which ones these are. There's not a lot of time over here at our side of this case to do all that I wish I could do to have thoughtfully said, well, we're going to do 508 and 511 but not this one for a particular reason. No. We're just trying to get through this work. And it's very -- it's wonderful work. So I have no complaints about that.

So what I'd like to do is begin with the first one that was listed, which is Veolia North America, the VNA defendants, general motion about improper jury arguments. And it's 489. And what we have is a list of 14 general items that

January 19, 2022

5

1 VNA wants the Court to address at this time.

2 And for anyone who's observing this who's not
3 familiar with a motion in limine, you might have become
4 familiar because there was a little bit of controversy over a
5 candidate who had been nominated to be a federal judge in a
6 previous administration and didn't know what a motion in
7 limine was. So the whole nation heard that word on the
8 evening news.

9 And what it is is it's a pretrial motion regarding
10 evidence that one side or the other thinks as a matter of law
11 should either be allowed or disallowed before we ever get to
12 the trial. So we don't even need the context of the trial for
13 these motions the lawyers argue. They are confident in their
14 position that these evidentiary issues or types of arguments
15 should be prohibited by the Court before the trial ever
16 starts.

17 And they're designed to make the trial run smoothly
18 so that we don't have to stop and send the jury to the jury
19 room or send them home and have all of these issues addressed
20 at that time. So all right.

21 So we have VNA's general sort of omnibus jury
22 argument motion up first. And is that Mr. Campbell?

23 MR. CAMPBELL: Your Honor, I am going to handle this
24 one. And I alerted Ms. Calhoun and the others that were on
25 the call before you joined, I am having some internet issues.

January 19, 2022

6

1 And I'm on a cell service right now I think. And if I -- if
2 it freezes, I might have to get off the video. So I hope
3 that's okay.

4 THE COURT: That's okay. And I can't tell you I've
5 just been through a handful of those problems at my own house.
6 So I understand.

7 MR. CAMPBELL: Thank you, very much, Your Honor.

8 So this omnibus motion addresses, as Your Honor said,
9 jury arguments. And I think that either all or most of them
10 are issues that should not cause any concern. And I can walk
11 through each one in the order they appear in the motion, if
12 that's okay with you.

13 THE COURT: Yes. So the first one is you're asking
14 me to prohibit arguments that insight local or anticorporate
15 bias.

16 MR. CAMPBELL: Yes, Your Honor.

17 THE COURT: And if I understand, the plaintiffs have
18 in their response brief -- although they didn't stipulate to
19 this because they don't think an order is necessary. I think
20 that they agree that they were never intending to do that in
21 the first place. But maybe we should make sure of that.

22 Is that Mr. Stern arguing? Mr. Maimon?

23 MR. MAIMON: Yes, Your Honor. And we agree that
24 there should not be arguments or statements designed to
25 insight regional, local, or anticorporate bias. The same way

January 19, 2022

7

1 that there shouldn't be other statements to insight anti
2 plaintiff bias.

3 But not only do we believe that there should not be
4 an order, that an order is not necessary, but if we probe and
5 ask VNA what do you mean by that, that's where the danger
6 arises. And so for instance, they believe that they -- that
7 the corporate status of VNA should not be disclosed to the
8 jury, that the jury should not learn -- Mr. Campbell's shaking
9 his head but I'm reading straight out of his motion or --

10 THE COURT: Okay. And Mr. Campbell, tell me if you
11 disagree with Mr. Maimon. What I understand in plaintiffs'
12 response is that there may be testimony that one of the
13 deciding factors for the City of Flint in selecting VNA to
14 perform a contract regarding water that led to your presence
15 in this case, that one of the factors Flint may have
16 considered was that your client is a prominent water
17 consultant with vast experience and so on.

18 And also the name of the defendant, you've got Veolia
19 North America. Veolia Water North America Operating Services
20 LLC. I mean, that -- so the jury will understand this is
21 probably not a Genesee County entity.

22 MR. CAMPBELL: That's correct, Your Honor. What the
23 motion addresses -- and I think it's fair to -- when you look
24 at the papers, it addresses the things that were raised in
25 some of the cases that we cited, the Bell case and some of the

January 19, 2022

8

1 others that go to, well, this is a billion dollar company or
2 this company's from some other state and we don't tolerate
3 that kind of thing here. Those are the kinds of arguments
4 that we're talking about.

5 And the one that you raised, Your Honor, really goes
6 to a different motion. But it's pertinent here, for sure.
7 And for sure the interchanges between the City of Flint and
8 VNA when the contract was signed, you know, we're a
9 corporation. And we're from a different state. That's where
10 it's incorporated.

11 But the point of this motion is the improper
12 arguments that frequently flow and have been addressed -- that
13 had been made in courts and wind up on appeal. And we're
14 trying to prevent that from happening and we're trying to
15 prevent having to stand up and object if we see a question
16 coming or one that's been asked.

17 And you know, the arguments that because we're a
18 corporation or because it's a large corporation or because it
19 has a french parent, none of that has any belonging in the
20 case. And I think that the -- it is the improper arguments
21 that were --

22 THE COURT: Right. So it's the argument and not the
23 mere fact that you are a corporation not housed here in
24 Michigan.

25 So in light of the fact that plaintiffs agree with

January 19, 2022

9

1 that, I find that it's moot. They don't plan to make argument
2 on that. They may present testimony if it comes out, I don't
3 know, that what the deciding factors were for Flint or
4 something like that that could reference VNA's location or
5 experience or size. But that's not argument.

6 So it's -- I think it's denied as moot on point one.
7 Or just it has been resolved at this point.

8 MR. CAMPBELL: Thank you, your Honor.

9 THE COURT: Now the next one is references to VNA's
10 size or wealth or plaintiffs' financial condition. And that
11 one, too, I think plaintiffs have agreed that they don't plan
12 to make those references other than in a factual presentation
13 if those facts are part of the reason that someone would
14 testify about selecting VNA or relying on VNA or something
15 like that.

16 Do I -- let me just find out from Mr. Maimon if I
17 understand that properly.

18 MR. MAIMON: Yes, Your Honor. And that really is the
19 point that the case law that addresses this that's cited by
20 the defendant, we agree with that case law. That the argument
21 that you should find in the plaintiffs' favor because the
22 defendant is wealthy or large or the plaintiffs are poor,
23 those are improper arguments which we're not going to make.

24 But certainly VNA touted its size, its resources to
25 the city. Certainly the city officials have testified, and we

January 19, 2022

10

1 expect they'd be consistent, that VNA -- and I'm just looking
2 at Mr. Ambrose -- being an internationally recognized firm in
3 water management was hired.

4 I mean, those are the types of things that if the
5 role of the city is going to be assessed and the
6 reasonableness of their reliance on VNA is going to be part of
7 the case, then all that is factual. And again, while we would
8 not make improper arguments, I think that we would make proper
9 arguments, that the city was justified in relying on that.
10 That VNA's representations about these things were important
11 to the city.

12 And I think that as long as the fact -- it's a
13 factual basis, that fair argument on the facts is proper.
14 Unfair argument is improper. And that's part of the problem
15 with motions such as this is that you don't know where it's
16 coming from.

17 So that for instance, I hate to move back, but on
18 page 4 of the motion papers, VNA says neither VNA status as a
19 corporation nor its state of residence are relevant. But so
20 they were arguing that we can't say that they're a
21 corporation, their status as a corporation.

22 Same thing here. Their size or their wealth or their
23 resources, it is relevant to certain issues but it would be
24 improper for us to suggest that that is a basis for finding
25 liability. And therefore, that's the problem that we have in

January 19, 2022

11

1 facing motions like this.

2 THE COURT: Mr. Campbell.

3 MR. CAMPBELL: Your Honor, if I may?

4 THE COURT: Yes.

5 MR. CAMPBELL: Yes. Again, these things overlap for
6 sure. But that particular issue goes, as Mr. Maimon put it,
7 that goes to the issue of what the duty is owed by VNA.
8 Whether VNA is a large corporation or a small corporation or a
9 small company or whether the city had expectations because it
10 was a large company or not, those don't go to the duty that's
11 owed. The duty is as to a reasonable company.

12 And I would say this motion or this part of it is,
13 again, this is something that got to the Sixth Circuit. So
14 this happens. And it's in the City of Cleveland case where,
15 you know, that what we are addressing at its heart is
16 appealing to the sympathy of jurors who references to
17 financial disparity is improper. Arguments of counsel
18 contrasting wealth and poverty or strength and weakness of the
19 opposing litigants have been condemned.

20 So that's what we're looking to preclude. And that,
21 you know, it's reasonable --

22 THE COURT: Correct. I heard Mr. Maimon say that
23 they're not making an argument to the jury to inflame their
24 passions or whatever that might be to say look at my
25 relatively economically disadvantaged clients relative to VNA.

January 19, 2022

12

1 So you should find in their favor for that reason.

2 Let me reassure you though that the Mr. Humann
3 testimony that was related to a corporation the size and
4 experience of VNA should have been aware in 2014 of certain
5 things, that won't come in because the 2014 issue has been
6 addressed in the motion for summary judgment. So that -- so I
7 do want to reassure you with respect to that testimony because
8 it won't be relevant to any fact at issue there.

9 However, if there's testimony from Ambrose or anyone
10 else that there were certain expectations based on who VNA
11 was, that -- then that would be relevant and it would be
12 permissible. But not for an unfair argument that their size
13 is the reason to award money damages. But rather that Flint
14 relied on this report because of the reputation of your
15 client. Things of --

16 MR. CAMPBELL: Again, I don't mean to belabor the
17 point. But what I would say to that, Your Honor, is I think
18 that's an issue that might be subject to additional briefing
19 of Your Honor. Because I don't think that what the
20 expectation, whatever that may have been by the City of Flint,
21 is relevant to the case.

22 But I understand for this particular motion and part
23 of it, I understand what you're saying, Judge.

24 THE COURT: But I think it can be common sense. That
25 if I hire a law clerk who I have 1,000 percent confidence in

1 and they send me a case and say the case stands for A, B, and
2 C, I'm going to trust that I don't have to read that case if
3 there's another one that I need my attention -- if there's
4 another case that I'm not familiar with.

5 So if Flint can say, look, we didn't check behind the
6 work of VNA because of its reputation internationally, that
7 surely seems relevant. And if they say, well, we would have
8 -- I don't know if this testimony is out there. We would have
9 otherwise done this if it had been some other, you know, ABC
10 engineering services.

11 So but I think the fact is that it's agreed that it
12 can't be referenced. Your size and status and wealth can't be
13 referenced for an improper purpose.

14 I do note that plaintiffs financial condition you
15 mention that you don't want plaintiffs to bring up. But I had
16 an opportunity to dip into your four expert psychologists,
17 neuropsych folks, who do reference the plaintiffs' relative
18 challenges, socioeconomic challenges.

19 So I sort of am not sure what you really intend --
20 how that's going to play out. But that won't -- we'll sort
21 that out. Because if you're saying the plaintiffs can't bring
22 it up but you're going to bring it up through your neuropsych
23 experts, we'll have to figure --

24 MR. CAMPBELL: Yeah. That's not what we're saying.
25 What we're saying in this part of the motion is it's improper

1 argument as recognized by the Sixth Circuit to say that this
2 is a big company and these are disadvantaged plaintiffs and
3 economically challenged plaintiffs and that that somehow
4 should be a factor for the jury to consider. It isn't. And
5 that's what this part of the motion addresses.

6 MR. MAIMON: And we agree with that, Your Honor. We
7 said it in our papers that the plaintiffs' financial
8 conditions should not be referenced in order to invoke
9 sympathy and the financial disparity arguments between the
10 parties is improper. That's not -- it's unremarkable.

11 THE COURT: Okay. So that's denied as moot. But
12 also it's duly noted that there is an agreement on these
13 issues.

14 The third one relates to suggestions that VNA owed a
15 heightened duty because of its size or sophistication. Here,
16 as I understand it, you're referring to the 2014 testimony
17 from Mr. Humann. Is that correct, Mr. Campbell?

18 MR. CAMPBELL: I would say it goes beyond that, Your
19 Honor. I think that it goes to some of the issues that we've
20 addressed with the first two segments. Having to do that
21 there is -- because the City of Flint allegedly in its
22 argument had a heightened expectation of VNA that somehow
23 creates a bigger duty or that because of the status of VNA as
24 being a company or a large company or whatever the statement
25 would be, that there is some heightened duty. There isn't.

January 19, 2022

15

1 The duty and under Michigan law is as to a reasonable
2 -- the degree of diligence and skill which is ordinarily
3 possessed by the average of the members of the profession in
4 similar localities. And that's the Cox case.

5 So that's where this motion is about, that an
6 argument that, hey, this is a big company. And therefore they
7 should have done extra or had some extra burden or, you know,
8 extra burden on them.

9 THE COURT: Correct. And I absolutely agree that the
10 city's expectations -- if the city says our expectations were
11 heightened because VNA was an international expert in this
12 area does not matter to the issue of whether VNA was
13 negligent.

14 But it's an interesting thing you raise because you
15 may want to argue that the government -- you have the nonparty
16 at fault cases to make and you're wanting to argue that the
17 government -- if anyone was negligent, it was state actors.
18 And so I could see so I could see that this issue still could
19 come up about whether there's reasonable reliance on VNA.
20 Mr. Maimon.

21 MR. MAIMON: Yes, Your Honor. So I think that
22 there's a difference here legally in that it is a -- it is
23 true that the standard of care is the same regardless of
24 whether or not it is a large engineer or a small shop
25 engineer, whether the engineer's been in practice for 30 years

1 as opposed to three years.

2 And by the way, Mr. Humann stated such in his
3 deposition. So we're not going to argue that -- that there is
4 a different standard of care -- which is a legal issue, by the
5 way. It's not a factual issue. It's what is the standard of
6 care.

7 THE COURT: Right.

8 MR. MAIMON: That's something that's charged by the
9 Court. We're not going to argue for a different or a
10 heightened standard of care based on VNA's size or
11 sophistication.

12 However, as a factual matter in determining whether
13 or not VNA met its burden and duty of care, its resources --
14 it's awareness is certainly a matter of fact that the jury can
15 and should take into account. If VNA because of its resources
16 knew certain things, because of its experience knew certain
17 things and they admit that they knew certain things, well then
18 that is relevant to a jury's determination as to whether or
19 not they acted reasonably in this circumstance.

20 And so you can't divorce that from who the
21 corporation is and how many engineers they have and what
22 Mr. Gnagy's or Mr. Chen's experience was in various jobs.

23 To be sure if somebody who just came out of
24 engineering school were on this job, the standard of care
25 would be the same. But the evidence with regard to what they

1 knew and when they knew it and what resources were available
2 to them would be different.

3 And therefore, again, it's not a question of a
4 heightened duty of care, but it's a question of what is
5 relevant to determining whether that duty of care was breached
6 or not. And that's what we say in our motion papers.

7 In addition to the issue of the notice of third party
8 fault and the reasonableness of the City of Flint's reliance
9 including but not limited to the very press release that they
10 issued explaining why they hired Veolia. And Mr. Nicholas,
11 who was their project manager on the job, his recognition of
12 the reliance about whether or not the water was safe to drink.

13 So these are issues that are going to be fleshed out.
14 But again, we agree it doesn't establish a heightened duty of
15 care.

16 MR. CAMPBELL: And Your Honor, the argument we're
17 intending to address is not that evidence. It is okay because
18 they knew that or because they are big company or because of
19 something else that they should have done something extra or
20 some, you know -- for this company in particular or it's the
21 extra that would be put onto to the ordinary -- the standard
22 that would apply under the law. That's what we're addressing.

23 THE COURT: I agree -- I think it's fair to say I
24 agree with both of you. Because Mr. Maimon is saying the size
25 and experience of VNA does not change the jury instruction on

1 duty. But facts may come in and won't be excluded if we -- if
2 there's testimony about 37 years of experience in a global
3 corporation addressing issues from lead to legionella to these
4 sorts of things that -- then that would be absolutely relevant
5 to a jury's consideration of whether an engineer in the
6 position of VNA with VNA's knowledge would have done certain
7 things.

8 So it's not going to increase the duty, not going to
9 decrease the duty. But there's going to be -- the story will
10 be told. And so I -- it's hard to tell whether I'm granting
11 or denying or what. But I don't think this is an issue. I
12 think it's moot in the sense that the description from
13 Mr. Maimon of what they intend to do is not prohibited by the
14 law. And there won't be any improper argument that there's a
15 heightened duty because of your size. That will be
16 impermissible and prohibited.

17 So now we're on arguments that the jury should send a
18 message to VNA or other corporations. And I think that's
19 agreed upon, that there was never an intention to do that.

20 Is that correct, Mr. Maimon?

21 MR. MAIMON: Yes, Your Honor. The reason that we
22 opposed again is the breadth of the language of the motion
23 that any argument implying this is so broad that -- the last
24 thing you want with an order on an in limine motion is to now
25 have re-litigation at trial as to whether or not that order

1 was violated. And if that's why in limine orders, our courts
2 tell us, should be narrowly tailored and their scope should be
3 narrow.

4 MR. CAMPBELL: Your Honor, our point is whether those
5 three words are used to send a messages or whether it's said
6 in four words or six words, it's directly, you know, or
7 indirectly. And I think that, you know, we don't -- you
8 reference common sense. I mean, when this argument is being
9 made, it has -- it's obvious and it shouldn't be made.

10 THE COURT: Correct.

11 MR. MAIMON: We agree with VNA.

12 THE COURT: Okay. So that is either denied as moot.
13 I mean, nobody's going to make that message or make that
14 argument. And if they do, they'll be shut down immediately.

15 The next one is statements to the effect that the
16 jury is the only entity with the power to regulate or change
17 the conduct of VNA or others. And I think that's in the same
18 pot with number 4.

19 MR. CAMPBELL: Yes, Your Honor.

20 THE COURT: Okay. Then statements that VNA acted
21 unethically, put profits over safety, or violated some
22 normative criteria other than the standard of care.

23 MR. CAMPBELL: And Your Honor, this goes to some of
24 the issues that we've -- that you've addressed. For instance
25 I think it was the Humann order. But one of the orders that,

1 you know, the -- or maybe it was summary judgment. I think it
2 was summary judgment. I'm sorry.

3 THE COURT: That's okay.

4 MR. CAMPBELL: You know, whether something is a moral
5 duty or not, it's not what we're talking about. And that is
6 part of this. As well as, you know, making reference to what
7 is or isn't ethical is in the same vein. And then the issue
8 of profits over safety is a punitive damage argument. And
9 it's one, as I understand it, that in the meet and confer that
10 we had on this that Mr. Maimon doesn't intend to make any
11 punitive damage arguments because punitive damages aren't at
12 issue in our case.

13 But that's the nature of this, that our standard of
14 care is as we've talked about, an engineering issue, and it's
15 not one that's governed by ethics.

16 THE COURT: Correct. And in the -- I think it was in
17 the first so far only Daubert opinion on Humann that I have
18 made clear that the ethical nature of VNA's conduct is not
19 what's on trial. And that opinions regarding morality,
20 they're already excluded.

21 But let's see, Mr. Maimon, anything further?

22 MR. MAIMON: Sure, Your Honor. Refer to Mr. Humann
23 as it came out through the Daubert process as well as to the
24 defendant's own engineers. When their depositions were taken,
25 they all acknowledged that the various ethical codes

January 19, 2022

21

1 established the duty of the care of a reasonable engineer.
2 And so they were shown the ethical codes that are applicable
3 wherever they are licensed and they admitted that this
4 establishes the standard of care.

5 And so you can't -- if we're to be able to have a
6 proper cross-examination or an examination of those experts by
7 showing them the code and establishing through their
8 admissions that that is the standard of care, it's not an
9 argument that the ethical violation is what's at issue here.
10 The argument is that the code of ethics that they all swear to
11 uphold establishes a standard of care according to their
12 admissions. And that it's the standard of care being violated
13 that establishes liability. That's number one.

14 And then number two, with regard to while
15 Mr. Campbell is correct that I did represent to his colleagues
16 that we would not be making punitive damage arguments because
17 punitive damages are not allowable under Michigan law in a
18 case such as this, that does not mean that the motives of VNA
19 are not at issue here.

20 And the reasons that they did various things is not
21 relevant for a jury's determination as to, number one ,
22 whether or not something was within the scope of their
23 services; number two, the arguments that they've made that
24 being only a \$40,000 contract for a very limited period of
25 time limits the scope and therefore abridges any ability for

January 19, 2022

22

1 there to be a breach of the duty of care during that period of
2 time.

3 All of these issues are relevant to what VNA has put
4 at issue in this case and --

5 THE COURT: And Mr. Maimon, I think we have a
6 different motion in limine about motive and intent that we'll
7 get to that argument. But I think there's agreement that a
8 judgment by a witness that the conduct was unethical or
9 immoral does not have any relevance to the duty.

10 MR. MAIMON: That it's -- first of all, we heard Your
11 Honor loud and clear in the opinion with regard to Mr. Humann
12 and he will not, neither will our other experts, offer any
13 opinions that either anybody acted immorally or unethically in
14 this case.

15 THE COURT: Okay.

16 MR. MAIMON: We will not make the argument that
17 they're liable because they were immoral or unethical. We'll
18 make the argument that they're liable because they violated
19 the standard of care.

20 THE COURT: Okay. And I think the only issue -- I'll
21 give you a chance, Mr. Campbell -- is the "put profits over
22 safety." And I'd like to just hold that over until we discuss
23 the motive and intent. Because there may be a place for that
24 in a different -- not under duty but breach.

25 So let's -- I don't want to make that decision now.

1 But it seems to me that there's agreement that the morality
2 and ethical duties and so on that plaintiffs are not intending
3 to use that testimony for that purpose. But Mr. Campbell.

4 MR. CAMPBELL: Yes, Your Honor. We also heard Your
5 Honor in the previous rulings and certainly don't want to
6 relitigate them at all. But our position is that the ethical
7 standards that were referenced are not relevant to the
8 standard of care. Understand Your Honor's rulings in the
9 past. I want to say that. That was it. Thank you.

10 THE COURT: Okay.

11 MR. ERICKSON: Your Honor, Philip Erickson.

12 THE COURT: Yeah.

13 MR. ERICKSON: We've, of course, joined in all of
14 these motions.

15 THE COURT: Okay.

16 MR. ERICKSON: And I want to say that, you know, we
17 object to the assertion by plaintiff that they can establish a
18 standard of care through questioning engineering witnesses
19 about the rules of ethics.

20 A lot of questions were asked about rules of ethics
21 during the depositions. But we objected to those questions.
22 And we object to Mr. Maimon's assertion that they can somehow
23 establish a standard of care in that way.

24 MR. MAIMON: Well, I would expect, Your Honor, that
25 if Mr. Erickson's clients' own witness, his own engineer

1 states under oath that this code of ethics, whichever one was
2 put in front of him, establish the standard of care and he
3 felt that they were bound by that standard of care in their
4 working at Flint, that that's relevant. That's an admission
5 of a party.

6 THE COURT: I think so, too. It can be relevant if
7 the rule -- the professional rules that guide engineers, if
8 that's part of what a reasonable engineer would do under these
9 circumstances is to take those requirements into
10 consideration. I think it could be relevant.

11 So I don't know if I'm granting or denying this. But
12 I think it's moot because it's the ethical and moral testimony
13 is not going to be used to establish a standard of care
14 separate from what a reasonable engineer would do. And the
15 professional codes on the rules of ethics may inform that. So
16 not a general moral duty that but if there are specific codes
17 that inform engineers, I think those are definitely relevant
18 to considering what a reasonable engineer would do.

19 So now we're on the motion of pending -- oh,
20 mentioning of pending claims by other plaintiffs. And here I
21 think it's very difficult to rule on this now. I certainly
22 understand that at the beginning of some depositions, some
23 lawyers identified themselves by as here sort of I represent
24 so and so in this case. And you put your appearance on the
25 record. And that Mr. Stern may have said and I represent

1 2,500 children in the Flint Water Cases. And he's not going
2 to say that here.

3 But I do think it's likely that the jury will come to
4 understand during jury selection or otherwise that these four
5 children are not the only individuals impacted by this
6 situation. And so all of us have to figure out what to do
7 about that. And it's -- because we want to make sure that the
8 jury is not reaching a verdict or if it reaches a liability
9 verdict that the damages represent only the damages of these
10 four children and not thousands of other children.

11 So that's important to me. It's important to all of
12 us. But I don't think anyone is going to say, well, there's
13 35 lawsuits -- 86 -- whatever it is. 86 lawsuits. And
14 they'll be prohibited from saying that. But there's little
15 chance that the jury is not going to know that there are other
16 cases.

17 So how do you suggest, Mr. Campbell, that that be
18 addressed?

19 MR. CAMPBELL: The way I see this is it's an issue of
20 staging or grading, if you will. So at one extreme, you know,
21 someone -- and I'm not suggesting Mr. Maimon or anyone else
22 would do it. I'm using it as an example. You know, these
23 four children are just one of 7,000 other lawsuits, right. So
24 clearly and obviously that's what the type of thing we're
25 trying to prevent here.

1 And then as you move on the spectrum, it would be
2 making reference to other lawsuits simply because there are
3 other lawsuits. I would say that given the nature of the
4 litigation where we're dealing with the water system in the
5 city where, you know, the city residents had access to the
6 water system, but there's going -- we necessarily are going to
7 know that other people beyond the four plaintiffs here and
8 their families consume the water. I mean, that's going to be
9 part of it.

10 What we are looking to prevent here is closer to that
11 -- to the extreme that I mentioned. And that is the fact of
12 other lawsuits should not be the part of an opening. It
13 shouldn't be the predicate of a question. The other lawsuits
14 are literally irrelevant to this lawsuit.

15 THE COURT: Right.

16 MR. CAMPBELL: These four lawsuits. So that's in the
17 first instance what we're trying to prevent. And certainly
18 it's not that there are other people that consumed the water
19 and may or may not be affected by it. It's the fact of the
20 lawsuits. That's what this is getting after.

21 THE COURT: Okay. Mr. Maimon. The remarks that
22 Mr. Campbell made about during opening this is one of 2,000 of
23 my clients' cases. Do you have any intention of doing that?

24 MR. MAIMON: So in opening statements, that's not
25 something that we would do, Your Honor. And I agree that

1 we're going to learn a lot out of the voir dire process,
2 especially given the press that's been given not only the
3 litigation and the crisis but also the settlement. You don't
4 settle something that's not a lawsuit. So they're likely to
5 be people who know that there were thousands of lawsuits.

6 People have heard about class actions. You know,
7 that's obviously something that we're going to learn about
8 that's going to inform us.

9 I would note, Your Honor, that the -- and I always
10 appreciate being the person who just for hypothetical's sake
11 makes the most extreme argument. But that's fair enough in
12 argument. But you can't have it both ways.

13 So for instance, one of the issues that Your Honor's
14 going to deal with today is the issue of indictments of state
15 officials and city officials. And the issues that that
16 relates to bias. We'll argue against it.

17 But that same bias argument could be used against VNA
18 or LAN officials that here are claims against you. It's
19 really no different than an indictment. It's somebody else
20 making a claim that you have responsibility, whether it's
21 criminal or civil, and you may have a bias to testify one way
22 because of that claim.

23 Now we don't intend on doing that with the VNA
24 witnesses or the LAN witnesses when they come into court and
25 impeach them by saying you're only saying this because you've

1 got 7,000 lawsuits pending against you. But that's --

2 THE COURT: But I think that issue comes up in every
3 case, that a defendant who chooses to testify, a jury could
4 think, well, they've got a motive to say they didn't do it.
5 They're on trial.

6 MR. MAIMON: Right. But I do think that there's no
7 secret that there are other, you know, many other children.
8 The medical experts are going to make reference to the studies
9 that have been done of the blood lead levels and the
10 neurocognitive deficits that have been recognized in the Flint
11 population of children.

12 That's not going to be -- that's going to be
13 something that's going to be the subject of expert testimony.
14 And so it's not only that a lot of people drank the water, but
15 a lot of people were impacted. And that's going to be part of
16 the expert proofs in this case.

17 And so it seems to me that we're really worrying
18 about something that everybody's going to know is there. And
19 the question is not to take, you know, artificial and plastic
20 steps to try and hide it from a jury. But the question is how
21 do you deal with a case or cases of this size, of this
22 notoriety and properly instruct a jury and properly give
23 limiting instructions so that all parties get a fair trial
24 including the defendants. We're not arguing against that.

25 THE COURT: Okay.

January 19, 2022

29

1 MR. CAMPBELL: Your Honor.

2 THE COURT: Yeah.

3 MR. CAMPBELL: There is a substantial difference
4 between, you know, a study that one of the experts might rely
5 upon in saying, oh, by the way, everybody in that study
6 brought a lawsuit or some of them brought it. Those are two
7 different things.

8 And the issue of whether or not jurors may or may not
9 know about anything about this, including that there might be
10 other lawsuits, you know, I can only go on things that I know.
11 In a more simple case, one involving a workplace accident, if
12 everybody knows that there's workers compensation available to
13 that plaintiff, it still is irrelevant.

14 THE COURT: Right.

15 MR. CAMPBELL: And it's still something that's not
16 part -- that should be part of the evidence. It shouldn't be
17 part of the opening. It shouldn't be part of the predicate of
18 questions about other lawsuits. That's the point.

19 THE COURT: And that's correct. And I hear
20 Mr. Maimon agrees with that. What I will tell you is I have
21 read only six juror questionnaires. And of those six jurors,
22 some of them knew that there are other -- there are people who
23 sued. And so I imagine that a question I would have is you
24 answered question 38 and you told us that you knew that people
25 have filed lawsuits.

1 Is there anything about that that would prevent you
2 from being fair and impartial in our case, in this case. And
3 our case is four individuals only. It's limited to them. And
4 so I'll start getting this information, these early
5 instructions to the jurors about what our case is. It's four
6 people. It's not those people. Anything about knowing about
7 other people would make it difficult for you to focus on these
8 four.

9 So I think it's going to have to be -- it will come
10 out. I'm just telling you. There is no way as you
11 acknowledge. And so but I will prohibit the plaintiffs from
12 saying they represent all these other people. All these other
13 people are waiting for their day in court against VNA and LAN.
14 That's not going to be allowed.

15 So I think it's something that ultimately will
16 require a carefully crafted jury instruction. And I think
17 there are had many out there. The Sixth Circuit doesn't have
18 pattern civil instructions. But I'm sure that we can find
19 pattern instructions that will address case -- this issue. Or
20 we can craft one.

21 So my suggestion here is that the mention of claims
22 by other plaintiffs, to the extent it comes out in looking at
23 studies and things, it's not to say they are plaintiffs. It's
24 not to say they are litigants against your client. But it
25 would be relevant to those studies to know how many people

January 19, 2022

31

1 participated, etcetera.

2 MR. MAIMON: Your Honor.

3 THE COURT: Yeah.

4 MR. MAIMON: The other context in which this is
5 something that generally can be expected to [Inaudible] trial
6 is within specifically cross-examination of adverse experts.
7 It's the typical cross-examination of an expert with regard to
8 his or her bias that you -- you know, you've been retained by
9 the plaintiffs in X number of cases.

10 So you always work for the plaintiff. In this case
11 you gave testimony for the plaintiff. In that case you gave
12 testimony for the plaintiff. And here I follow Mr. Campbell's
13 lead of putting the argument on myself.

14 But again, you know, I've been -- I haven't been in a
15 trial where both plaintiffs and defense experts haven't been
16 cross-examined that way. That tells you that there are other
17 cases pending. Again, you don't say I represent them or
18 something like that. But the fact that there are other
19 lawsuits is not going to be a secret to this jury.

20 And in fact, the experts' involvement in them or
21 other lawsuits is going to be the subject of
22 cross-examination. And so I agree that what needs to happen
23 here is a carefully crafted instruction and not a broad in
24 limine order.

25 MR. CAMPBELL: And Your Honor, if I just follow up on

1 my expert issue. Typically that has to do with other various
2 and disparate cases wherever. Here, I can't say whether it
3 would be in, you know, some other case involved in the
4 litigation. But you know certain of the -- there's no need to
5 cross-examine an expert about other cases in this litigation.
6 I think it might be something --

7 THE COURT: Okay.

8 MR. CAMPBELL: -- time. But I don't see how that is
9 a need.

10 MR. MAIMON: Well, we can cross that bridge when we
11 come to it, can't we?

12 THE COURT: We can what, Mr. Maimon?

13 MR. MAIMON: Cross that bridge when we come to it.

14 THE COURT: Yeah. And it would be Mr. Campbell
15 asking the question. And he says he doesn't want the jury to
16 know about other cases so I think he's not going to ask the
17 question of your experts.

18 MR. MAIMON: But I'd like the opportunity to ask them
19 of his, Your Honor.

20 THE COURT: Oh, about whether his clients are
21 receiving remuneration for -- for instance the neuropsych for
22 evaluating 1,000 other people or something?

23 MR. MAIMON: Or their water experts or their
24 remediation -- you know, all their experts. These are not the
25 only four cases in which they're working for these either

January 19, 2022

33

1 defendants or their firms or so forth.

2 THE COURT: What's your response to that,
3 Mr. Campbell?

4 MR. CAMPBELL: I'm not sure that I agree with that.
5 I mean, these four bellwether cases are the only cases that
6 are -- have been worked up, if you will. And I'm trying to
7 think of the other, you know, the plaintiff specific kind of
8 medical type experts.

9 And I can't say for sure whether they examined other
10 plaintiffs or not. But if they did, it would be limited to
11 the very handful that were within the first bellwether pool.
12 But it's not a situation where there's thousands of them or
13 whatever. And it's not a situation -- the water experts are
14 working on this -- these four cases.

15 So I mean, there is the litigation. But I mean, it's
16 for these four cases.

17 MR. MAIMON: That's why I said we should cross that
18 bridge when we come to it.

19 THE COURT: I think that's what we should do is that
20 generally counsel on both sides should not point to their
21 other plaintiffs who are not here and that sort of thing. But
22 before the first expert, defense expert testifies, we'll
23 revisit this and see whether at that time if Mr. Maimon wants
24 to ask that question. He'll inform me. I will count on you
25 all to remind me at the time because that will be months from

1 now I'm afraid. And I want to be sure not to lose track of
2 that.

3 And so motion in limine number 491, let me see, also
4 addresses this question. So is there anything else in 491
5 which was not up for today, I think, but I'm pretty sure
6 that's what was in that motion? So have we resolved that as
7 that motion as well?

8 MR. CAMPBELL: Your Honor, you are testing my ECF
9 knowledge. I don't know what 491 is.

10 THE COURT: I have them all listed in a separate
11 document. So let me just open that document really quickly to
12 make sure. Because any efficiencies we can accomplish, we
13 should. Okay. I'm almost there.

14 MR. MAIMON: Was 491 set for argument today, Your
15 Honor?

16 THE COURT: No.

17 MR. MAIMON: No.

18 THE COURT: But I think it's the same argument. 491
19 is VNA's motion to exclude evidence and argument regarding
20 other claims and lawsuits.

21 MR. NGUYEN-DANG: Your Honor, if I may?

22 THE COURT: Yes.

23 MR. NGUYEN-DANG: Nguyen-Dang. No, Your Honor. This
24 one is about other lawsuits against VNA not connected to
25 Flint.

1 THE COURT: Oh, 491 is other lawsuits against VNA not
2 connected to Flint?

3 MR. NGUYEN-DANG: That's right.

4 THE COURT: Okay. All right. Well, we'll do that --
5 we'll have that argument when we're up to speed on it. Thank
6 you. But I'm glad to know that.

7 So let me get us back to where we were. Good. Okay.

8 So now number 8, mention of counsel's representation
9 of other plaintiffs or appointment as lead or liaison counsel.
10 Mr. Maimon, you don't intend to say the Court appointed us to
11 be the lead counsel?

12 MR. MAIMON: Correct.

13 THE COURT: Okay. Then that one's moot. Right,
14 Mr. Campbell?

15 MR. CAMPBELL: Yes, Your Honor. Well --

16 THE COURT: Or that I represent -- what?

17 MR. CAMPBELL: I understand how you're ruling that
18 they're moot based upon the representation that that won't
19 occur and understand that's what you're doing as opposed to
20 entering the order allowing the motions.

21 THE COURT: Okay. Understandably.

22 The next one is comments about opposing counsel and
23 other distracting tactics. I don't think anybody intends to
24 do that. Correct, Mr. Maimon?

25 MR. MAIMON: Not us certainly.

January 19, 2022

36

1 THE COURT: Okay. So that's now agreed upon.
2 References, okay, to defendant's collectively. Okay. This is
3 one where we get into the English language. But go ahead.

4 MR. CAMPBELL: Your Honor, I understand the English
5 language aspect of it and the reaction to it. I mean, when
6 Your Honor charged the -- did the pre-charge for the juror
7 questionnaires, that's completely reasonable and appropriate
8 in that circumstance.

9 But here's the thing, you know, VNA and LAN are in
10 two very distinct places. And it really has to do with
11 timing. So I think at the bottom of this concern might be
12 let's say there's an event or something that happened in 2013.

13 THE COURT: Right.

14 MR. CAMPBELL: Or 2014. And then there's a
15 reference, well, the defendants did X, Y, and Z at that time.

16 THE COURT: Okay.

17 MR. CAMPBELL: So that, we have to unpack. Well,
18 when you said that the defendants did it, it can't be VNA
19 because we weren't there until 2015. I think that's the real
20 concern here, if you will, Your Honor.

21 MR. MAIMON: Your Honor --

22 THE COURT: That's fair. Mr. Maimon.

23 MR. MAIMON: Yes. So part of the problem with having
24 motion practice and then when we come to argument to
25 articulate, the, quote, unquote, "real concern" is that what

1 are we doing with the motions and what are we doing with the
2 briefing? To say that we can't refer to them collectively.

3 And it's great that Mr. Campbell now says that it's
4 perfectly reasonable to refer to them collectively in the
5 pre-charge, but they objected to it. So he didn't think it
6 was reasonable when the time came to craft the statement of
7 the case.

8 Similarly, the pattern jury instructions refer to
9 defendants in the plural. Similarly, there's one standard of
10 care, as he's pointed out, for both LAN and VNA. So it's not
11 the VNA standard of care and the LAN standard of care. It's
12 the standard of care that applies to the two defendants.

13 So there's no way not to refer to them as defendants
14 here. So and that's the way in which the motion was framed.
15 That's the way which we're responding.

16 THE COURT: I'll give you a chance, Mr. Campbell.
17 But first of all, I think Mr. Campbell is saying that he
18 understands I made a decision about informing the jury of what
19 is the role of a plaintiff, what is the role of a defendant,
20 and who are they. And so he just -- he accepts that is what I
21 think he's saying.

22 But I do see that there will be times during the
23 trial where the use of the plural defendants makes sense.
24 Because there are two and they are both defendants and they
25 have the same duty and so on.

1 But I think -- and also there happen to be three LAN
2 defendants and three VNA defendants. So you could easily be
3 saying defendants in 2013 and thinking in your mind I'm only
4 talking about LAN because there are three of them.

5 But I think what we should agree is that VNA is going
6 to be a singular word and LAN will be a singular word. And
7 where you're actually asking did LAN breach a duty in 2013,
8 just use their name. Because you actually want to know that.
9 You don't want to know if VNA breached anything there.

10 MR. MAIMON: Absolutely, Your Honor. What I don't
11 want, and that's the way that this motion was phrased, is to
12 be scripted that I can't say the word defendants.

13 THE COURT: No.

14 MR. MAIMON: Or that Mr. Stern can't say the word
15 defendants. Because that's not the law. There's no case that
16 supports it. And it would be contrary -- Mr. Campbell's
17 concern, as Your Honor pointed out, would be contrary to our
18 interest where we want to have a -- the only finding we can
19 have with regard to 2013 and 2014 is LAN at this point. Your
20 Honor has ruled that. And so it would be foolhardy on us to
21 leave any ambiguity with regard to that.

22 THE COURT: Mr. Maimon, I agree with you in the sense
23 that, Mr. Campbell, I can't tell Mr. Maimon and his colleagues
24 that they can't ever say defendants.

25 I mean, I think that at the end of his closing

1 statement, he'll say I will get a chance to come back at the
2 end of our case and give you my final argument. And at that
3 time I will ask that you find these defendants liable for
4 professional -- I mean, he'll say -- that's got to be
5 permitted.

6 And we'll have a jury instruction that reminds the
7 jurors that there are two defendants and they can't attribute
8 one's conduct to the other and they need to be considered
9 separately.

10 MR. CAMPBELL: Your Honor, I'm not going to disagree
11 with that. But again, the point is that the two groups of
12 defendants, the LAN defendants and the VNA defendants are,
13 number one, separate. But also separate in time and separate
14 in conduct.

15 So the concern -- you know, I appreciate what
16 Mr. Maimon is saying about the use of the word. But I'm
17 telling, you know, we're trying to find a solution here with
18 this motion. And what we're getting after is the confusion
19 that could come when questions or arguments are made as to the
20 defendants when it only applies to one. And it puts and
21 introduces confusion.

22 I can't say whether it would or wouldn't be at the
23 time helpful or unhelpful to the plaintiffs. But I do know in
24 certain circumstances it would be confusing and then places
25 the burden either on VNA or LAN to unpack that. Say, well,

1 wait a minute. That wasn't us.

2 THE COURT: Mr. Maimon.

3 MR. MAIMON: I think one solution is if -- you know,
4 vagueness, by the way, isn't an objection under the court
5 rules. If a question is vague, improperly vague so -- then an
6 objection is the appropriate mechanism to deal with it, not an
7 in limine order upfront.

8 THE COURT: Mr. Campbell, here's the thing, I agree
9 that I can't ban the word of -- the word defendants from the
10 trial. And so -- and I won't.

11 I do want to tell you a short story which is that I
12 had a three-defendant criminal case where defendant number 3
13 was only involved in one part of tax fraud that was in this
14 amazing scheme. Amazing scheme. His lawyer, every witness
15 who came up to testify against all the other two defendants,
16 would say, "And my defendant -- my client wasn't there. Oh,
17 no, no. I don't know your client."

18 And so every time they reinforced to this jury that
19 defendant number 3 wasn't a part of counts 1 through 80, it
20 reinforced. And he was acquitted. And I'm telling you, if I
21 was on the jury, what I saw of his conduct in that one narrow
22 slice was beyond a reasonable doubt.

23 So it was a constant repetition to the jury. But
24 that wasn't my client, right? So if you want to stand up and
25 cross-examine witnesses that the plaintiffs are bringing for

1 LAN, have at it and say, "But that's not VNA. I wasn't there.
2 My client wasn't there." But if you think there's any
3 confusion, certainly do that.

4 But I'm going to ask the plaintiffs to be as clear as
5 possible. When using plural, make sure it applies. So I
6 think the motion is denied with respect to use of the plural
7 defendants. But I think your point has been made.

8 MR. CAMPBELL: Thank you, your Honor.

9 THE COURT: Yeah. Okay. The golden rule. No one is
10 going to talk about the golden rule. So that's moot. Okay.

11 And number 12, statements to the effect that
12 compensation that plaintiffs may receive from nonparty
13 defendants is inadequate.

14 Mr. Maimon, you're not going to do that, are you?

15 MR. MAIMON: So first of all, under Michigan law, the
16 amount that any plaintiff might receive from a settling party
17 is inadmissible. We're not going -- by the way, we don't even
18 know. So we can't -- we can't say with regard to that. And
19 the amount of a settlement is not properly before a jury. So
20 how could you argue that it's inadequate?

21 Our concern with the way the motion was made is that
22 one of the issues that will come up at trial assuming that the
23 jury finds liability is the allocation of fault among the
24 parties found liable.

25 And to the extent because the defendants have the

1 burden of proof on the nonparty liability, to the extent that
2 they propose a very large share of liability for a nonparty,
3 we believe that it's proper argument to say that that would --
4 that's not an adequate liability finding against VNA. That
5 doesn't fairly reflect their liability here. Because they're
6 responsible for their share. So --

7 THE COURT: But you'll be arguing -- I mean, I don't
8 know what percent you think VNA or LAN are responsible for.
9 But that doesn't have anything to do with references to the
10 compensation that they're getting through the settlement,
11 whether that's adequate or not.

12 MR. MAIMON: Absolutely correct, Your Honor.

13 THE COURT: Okay.

14 MR. CAMPBELL: Your Honor?

15 THE COURT: Yes.

16 MR. CAMPBELL: I think this one has another component
17 to it.

18 THE COURT: Oh.

19 MR. CAMPBELL: And that would be the argument that
20 while none of these other parties are here and none of these
21 other parties are going to pay the judgment and, therefore,
22 you should increase -- and I'm just suggesting what, you know,
23 what we're trying to get at. And therefore you should
24 increase the percentage or completely disregard the nonparties
25 at fault because they're not here to pay the bill, if you

1 will. That's not proper.

2 THE COURT: That's not proper. I agree.

3 MR. CAMPBELL: Arguing that what the percentages are
4 for sure that's fair game and that's what our trial is going
5 to include. But it's the argument to say, well, you should
6 have a larger percentage on VNA and a smaller percentage on
7 Governor Snyder or some other nonparty at fault because
8 they're not here or they can't pay the judgment. That is
9 completely 100 percent improper and shouldn't be allowed.

10 THE COURT: And I think -- let's find out if
11 Mr. Maimon agrees.

12 MR. MAIMON: Yes. We're not going to argue that the
13 -- it is improper to have -- let's say -- it is improper, we
14 agree, to argue for -- to tell a jury that they should find
15 more liability for one over another because one has insurance
16 and one doesn't. That's improper. Ability to pay is not a
17 matter of that.

18 I could argue on the facts that one should be held
19 more liable than the other and we will do that. But we will
20 not make an argument about whether or not to what extent
21 anybody will make any payments here.

22 THE COURT: Okay. Then, okay, 13 references to
23 settlements by nonparties for VNA's decision to litigate.

24 Mr. Maimon, do you intend to do that?

25 MR. MAIMON: So we intend -- so there is a separate

1 motion with regard to the introduction of evidence about the
2 -- about settlement. And I'm ready to deal with that either
3 now or later.

4 THE COURT: Why don't we --

5 MR. MAIMON: -- or the second portion of that --

6 THE COURT: Let's deal with the issue of VNA's
7 decision to litigate.

8 MR. MAIMON: All we intend on reiterating, which I'm
9 sure VNA agrees with and will say is that they have an
10 absolutely right to litigate.

11 THE COURT: Yeah. And the jury will know that.

12 MR. MAIMON: They'll be told they're litigating it,
13 yes.

14 THE COURT: But the jury's going to bear witness to
15 the defense and to VNA's position that it doesn't have
16 liability.

17 MR. MAIMON: We are going to argue against their
18 position that they have no responsibility here.

19 THE COURT: Well, yes. Otherwise we'd have a
20 resolution right now.

21 MR. CAMPBELL: And Your Honor, the issue that can
22 come out thus far, you know, VNA's the only party to not
23 accept responsibility. VNA's the only party that chose to
24 litigate this. Those types of arguments are what we're trying
25 to get at and they don't belong in the trial.

1 THE COURT: They don't and they won't be there.

2 MR. MAIMON: Well, so we're not -- first of all, it's
3 untrue because LAN also has not settled, but --

4 THE COURT: Yeah. And we have the US EPA issue out
5 there. We have the underwriters issue to be resolved, so.

6 MR. MAIMON: Putting that aside, it is a fact that
7 VNA and their witnesses and their corporate executives do not
8 accept responsibility for their role in what happened here.
9 And we plan on telling the jury that we think that that
10 position is unreasonable and incorrect.

11 THE COURT: That's what a trial is all about. So we
12 will have a trial and those issues will be what the trial is
13 about.

14 In terms of comments that VNA conspired with the City
15 of Flint, I don't see that in the complaint at this time so I
16 don't even know where this comes from. Who's alleging that
17 there was a conspiracy, the claim that survives anywhere here?

18 MR. MAIMON: So we don't bring a claim for
19 conspiracy, for civil conspiracy, Your Honor.

20 THE COURT: Right.

21 MR. MAIMON: However, we do believe that there is
22 evidence that will show that there was a concert of action
23 between both the city and VNA with regard to, you know, the
24 failure to warn to the extent that the city is found liable
25 under the third party fault assertions by VNA that they failed

1 to switch back to the Detroit water system. They failed to
2 implement corrosion control. We believe that there was a
3 concerted action between the engineering firms and the city in
4 doing so.

5 And so by using the term conspiracy and collusion in
6 the motion, you're charging the motion. The evidence will be
7 what the evidence will be. We will not be using the term
8 conspiracy at trial. For the most part because it has a legal
9 definition and we don't want to get into that.

10 THE COURT: And do you intend to do that in your
11 opening statement?

12 MR. MAIMON: No.

13 THE COURT: Okay. Mr. Campbell?

14 MR. CAMPBELL: I think that if we have an agreement
15 that it's not in the opening statement and we can see how the
16 evidence comes in.

17 THE COURT: Yeah.

18 MR. CAMPBELL: But Your Honor's correct. There is no
19 -- the only claim is professional negligence. And that's not
20 a conspiracy claim nor a corruptness claim between VNA or LAN
21 and the city. It's a professional negligence. And whatever
22 evidence comes in has to be relevant to that claim.

23 But with the representation that it's not in the
24 opening, we can see how the evidence goes.

25 THE COURT: Okay. So that --

January 19, 2022

47

1 MR. ERICKSON: Your Honor, Philip Erickson.

2 THE COURT: Yeah. Hi, Mr. Erickson.

3 MR. ERICKSON: I just want to mention that I don't
4 believe concert of action is applied anywhere either.

5 MR. MAIMON: Again, that's not a legal theory that
6 we're advancing, Your Honor. But it is relevant to the issue
7 of the allocation of fault under the very statute that allows
8 the defendants to assert nonparty fault. And that is the
9 conduct of each, their contribution to the harm caused by the
10 plaintiff.

11 And to the extent that the city or the state together
12 with one or both of the defendants was acting in concert in
13 that way, it might not create an independent basis of
14 liability but it might be relevant to the liability of
15 professional negligence. That's our point.

16 And I agree with Mr. Campbell that, you know, we can
17 see what the evidence is and then the Court can determine what
18 is the proper use of that evidence after it's come in.

19 MR. ERICKSON: Your Honor, if I might respond.

20 THE COURT: Yes.

21 MR. ERICKSON: The concert of action is a legal
22 theory. It's a legal claim which hasn't been pled. And I
23 don't believe that plaintiff should be allowed to assert the
24 theory and then just call it a factual statement when they
25 haven't pled it.

1 THE COURT: Well, Mr. Maimon --

2 MR. ERICKSON: Perhaps additional briefing on that
3 point is appropriate.

4 THE COURT: Why don't we do this. If Mr. Maimon asks
5 a question of a VNA witness and the question is, "Did you
6 agree with X or Y emergency manager not to publish certain
7 things in your report that you knew to be true," I think
8 that's relevant to what happened.

9 It's not going to make a civil conspiracy claim.
10 It's not -- it's part of the story, well, that is to be told
11 here. So I -- I don't think further briefing would help.
12 Let's see what the -- how the questions are asked, whether
13 they draw an objection at the time. And just deal with it as
14 we know what the evidence shows.

15 MR. ERICKSON: Thank you, your Honor.

16 THE COURT: Thank you. So Mr. Erickson, is there
17 anything else on -- did LAN file a concurrence in that entire
18 slew of arguments?

19 MR. ERICKSON: Yes, we did, Your Honor. But I don't
20 have anything further to add.

21 THE COURT: Okay.

22 MR. ERICKSON: Thank you.

23 THE COURT: Thank you. So then we're going to move
24 on to 490, which is VNA's motion to exclude evidence of
25 Co-defendants' settlement. We've somewhat discussed this

1 already. And as I think everyone agrees that Michigan law
2 prohibits admission of evidence regarding a settlement as a
3 general matter. So we know that. There's no doubt about
4 that.

5 I think the real question here is how we're going to
6 address jurors' knowledge of the settlement in -- during jury
7 selection. And should it come up somehow through a witness
8 who we don't expect them to say something? I've seen that
9 happen with workers' comp and it's a mistrial. So we're going
10 to do everything we can not to have it come up.

11 But in light of the degree of press coverage about
12 the settlement and the fact that the claims process is ongoing
13 right now under the settlement and there is media coverage of
14 that here in Michigan, I think they will know that some part
15 of this litigation got resolved. And the question is can they
16 set that aside and look only at this case in making their
17 decision.

18 But tell me, Mr. Campbell, are you arguing this?

19 MR. CAMPBELL: I am not, Your Honor. And I forget
20 who on --

21 MR. NGUYEN-DANG: I am, Your Honor.

22 THE COURT: Okay. Mr. Nguyen-Dang.

23 Well, let me start with -- is it Mr. Maimon, are you
24 responding? Okay. Do plaintiffs intend -- did you want to
25 use the settlement as an exhibit? Let's start there.

January 19, 2022

50

1 MR. MAIMON: No.

2 THE COURT: Okay. I didn't think so. So at least we
3 know that. And so how do you intend to use the settlement at
4 all?

5 MR. MAIMON: We don't intend to use the settlement.

6 THE COURT: Yeah.

7 MR. MAIMON: So again, I don't think that that's --
8 but Your Honor is correct that plenty of people out there know
9 not only about the litigation, not only about the Flint Water
10 Crisis, but they know about the settlement. And the question
11 in my mind is not only for those people and in those
12 circumstances can you put it aside, but in the circumstance in
13 which a jury knows about it, I believe that there must be an
14 instruction by the Court that they must put it aside.

15 THE COURT: Absolutely.

16 MR. MAIMON: It's not enough just to say, hey, can
17 you put it aside and they say yet. But there has to be an
18 instruction about that. And that's why it's not an iron clad
19 rule, especially in circumstances. And that's why the Estate
20 of Carlsen case is instructive.

21 In that circumstance, where the jury learned about a
22 settlement, what does the court say or where the jury knows
23 about a settlement. You know, I look at the page and line
24 designations by the defendants with I represent the State of
25 Michigan. I represent the City of Flint. I represent

January 19, 2022

51

1 Mr. Croft. I represent this person, that person.

2 THE COURT: Exactly.

3 MR. MAIMON: Where are all these people who were not
4 only involved in the issue, but their lawyers involved in the
5 case that the jury is hearing about? And you know, it's one
6 thing if you have all live testimony. And so you don't have
7 to have those types of things. But -- and I'm not saying that
8 you tell the jury about a settlement. What I'm saying is that
9 an in limine motions to absolutely bar dealing with this issue
10 is unwise.

11 THE COURT: Well, and here's what I'm interested in
12 for both of you. So Mr. Nguyen-Dang, in the juror
13 questionnaires I've already seen a juror say, you know, the
14 question what do you know about what happened in Flint. I
15 know the case got settled. I mean, I think that was written
16 just like that.

17 So we're not going to exclude that person just
18 because they say they know that. That's not a basis to
19 exclude somebody without further questioning.

20 So what I'm most interested in is have you crafted or
21 will you be crafting a jury instruction to make sure jurors
22 know that whatever happened in that settlement is not a part
23 of this. Do not consider that. Etcetera, etcetera.

24 MR. NGUYEN-DANG: Right, Your Honor. I mean I agree,
25 of course, as a starting matter that, as you've noted under

1 Michigan law, the jury should not be told about a settlement.
2 But we are, as you say, faced with a situation where it is
3 likely that some members of the jury may know of the
4 settlement or know of the existence of the fact that other
5 nonparties have been sued.

6 And I think what we would propose that's I think more
7 consistent certainly with the Barnett and Brewer case that's
8 from the Michigan Supreme Court is to simply tell the jurors
9 that they are simply not to speculate as to why any person or
10 any nonparty is not at trial and to decide the case only based
11 on the evidence that they hear at trial.

12 And that has the added -- that has the -- you know,
13 first that respects the Michigan rule that is quite iron clad
14 about not informing jurors of the existence of the settlement,
15 but also has the added benefit of covering other nonparties
16 who haven't settled. So for instance, as you've noted, the
17 EPA or others. So to simply say that there has been a
18 settlement might actually be --

19 THE COURT: Slow down. Slow down.

20 MR. NGUYEN-DANG: I apologize. So to simply say that
21 there was a settlement, you know, that's why somebody is or
22 isn't at trial might actually be incomplete and inaccurate.
23 But on the other hand it would be unnecessary and confusing as
24 to go through every single nonparty and to why they are or are
25 not at trial.

1 So we think the simpler, the more consistent approach
2 would be to say, yes, there are other nonparties. In fact,
3 we're going to talk about the fault of those other nonparties.
4 And the jury is just not to speculate as to why they aren't at
5 trial and to decide the case solely based on the evidence
6 presented at trial.

7 THE COURT: Any objection to that, Mr. Maimon?

8 MR. MAIMON: Yes, Your Honor. And I don't know --
9 it's an "I don't know" objection because I think it's
10 premature.

11 Those cases which have crafted instructions like
12 that, you may hear about other parties such as A, B, and C who
13 aren't present here. You're not to speculate as to why
14 they're not here. You're to decide the case of this plaintiff
15 against that defendant without thinking about that.

16 Those are cases where the knowledge of a settlement
17 is not within -- the jury doesn't know that there's a
18 settlement. We're in a peculiar situation here and we're
19 going to learn more about it as we look through the
20 questionnaires and as we conduct voir dire.

21 You may have several jurors who know that there's a
22 settlement. And by giving them an instruction that doesn't
23 deal with that but rather says don't speculate. You're
24 inviting them to say, well, I know why they're not here. As
25 opposed to if they don't know why they're not here.

1 And so what I'm suggesting is I think that it's
2 premature to start crafting instructions to a jury the same
3 way that it's premature to have an in limine order that the
4 fact of a settlement is not to be dealt with at trial.

5 I think that, number one, we need to see what our
6 jurors know. And number two, we need to see what the
7 testimony is going to be like to deal with the other parties
8 who are represented at various depositions that are introduced
9 into evidence. And then we can all make an informed decision
10 and careful decision with a carefully crafted instruction.

11 THE COURT: And I agree and I don't think
12 Mr. Nguyen-Dang disagrees. But he's just suggesting what we
13 might use as an instruction.

14 Here's what I'm thinking we need to do is in our
15 conference on February 2 when I'm going to consider and rule
16 on challenges based on the jury questionnaire, I think at that
17 point it would be very helpful for me to have a proposed
18 approach during jury selection for follow-up questions.

19 Once we look at the questionnaires and we see
20 whether -- how many individuals say they're aware of the
21 settlement or they're not or whatever, might be going on, I
22 think I would like the collective work of everyone here to
23 inform me on how I should question them. What follow-up
24 questions are appropriate for those jurors in the presence of
25 all the other jurors who say that they know about the

1 settlement.

2 Because I don't think it would be proper to not
3 address that. But if you think it is proper just to let that
4 go and it's in the questionnaire for -- you all agreed you
5 wanted to ask about it. We get an answer. And then we're
6 going to put it aside. That's okay if that's what we agree is
7 best. But I'd like to know what you think should be done.

8 So we'll just add that to our February 2, 11:00 AM
9 hearing to make sure we have an agreement.

10 So I mean, there won't be evidence -- the settlement
11 won't be evidence in our case. So it may be referenced
12 inadvertently or advertently by an expert or somebody, I don't
13 know. But it won't be evidence in the case.

14 Are we agreed on that, Mr. Maimon?

15 MR. MAIMON: Well, the only way I could think of that
16 it might be evidence, Your Honor, and that's again why I think
17 a motion like this is a can of worms, is to the extent that
18 there is a state official or a city official or an EPA
19 official on the stand, I could see a circumstance -- it's not
20 that the plaintiffs will elicit it. I doubt that we would
21 elicit it.

22 But I can imagine a situation in which somebody is
23 faced with a question about whether or not they accept
24 responsibility for what happened here. And it may be -- and
25 again, these are not my witnesses and these are not

1 Mr. Campbell or Mr. Erickson's witnesses. They're independent
2 witnesses. They might say I have. We settled.

3 THE COURT: Yeah.

4 MR. MAIMON: And again, that's the type of a
5 situation that the Carlsen court dealt with. And both found
6 that and the appellate court found that it was an error and
7 that the court dealt with it properly in giving a subsequent
8 instruction. And I think that that's the guidance that is
9 proper here.

10 THE COURT: I think -- I can see the scenario you're
11 talking about. But I think the Brewer court makes it very
12 clear that mentioning the existence of a settlement is
13 prohibited. So we would need a corrective instruction if that
14 happened.

15 But Mr. Nguyen-Dang, anything further?

16 MR. NGUYEN-DANG: No. Just a little bit, Your Honor.
17 I think really what we're trying to do here is just set the
18 ground rule, which I think everyone agrees as you just
19 mentioned that we should, A, like we should not mention the
20 settlement. And that is, as you say, Brewer is very clear
21 about that.

22 And so really we're just looking for that ground
23 rule, which I should mention the trial court actually put that
24 ground rule in the Carlsen case that Mr. Maimon refers to.
25 And if, you know, the situation arises where by inadvertence

1 we would hope, by inadvertence something happens, then I agree
2 with Your Honor then we can deal with it then to try to craft
3 the appropriate limiting instruction or corrective
4 instruction. And as I said, we've proposed one. But again,
5 it's something to address then.

6 THE COURT: And I can guarantee that a juror is going
7 to put their hand up and say I don't understand. I thought
8 this case was settled. So I just think it's going to happen
9 sooner rather than later. So I'd like to be prepared for
10 that.

11 Looking at the Estate of Carlsen case reminded me to
12 discuss what this -- how this case will be called in court
13 with the jurors. And I am suggesting that we call it Sherrod,
14 Teed, Vanderhagen, and Ware versus VNA and LAN. Is that what
15 you're anticipating the case would be called?

16 MR. MAIMON: That's fine with us, Your Honor.

17 THE COURT: I just took it in the order of the
18 children that you provided to me in the statement of the case
19 and the order of the defendants you provided me in the
20 statement of the case.

21 Any objection to that as the case caption as it's
22 going to be called, Mr. Campbell, or Mr. Nguyen-Dang?

23 MR. CAMPBELL: Your Honor, no objection to that.

24 THE COURT: Okay.

25 Mr. Erickson, you didn't have -- this was -- a motion

January 19, 2022

58

1 on this issue. This was VNA's motion. Am I correct?

2 MR. ERICKSON: Your Honor, we've joined in all of the
3 motions.

4 THE COURT: Oh, okay.

5 MR. ERICKSON: But I don't have anything to add.

6 THE COURT: Okay. Okay. Now what we're going to do
7 is take a break. So we'll take about a 5, 10 minute break and
8 be right back. Thank you. So don't log off. Just turn the
9 video off and the mute.

10 MR. CAMPBELL: Thank you, your Honor.

11 (Pause In Proceedings)

12 THE COURT: Okay. So we will now discuss motion in
13 limine number 492, which is VNA's motion to exclude testimony
14 regarding mental states.

15 And is that Mr. Nguyen-Dang?

16 MR. CAMPBELL: No, I think that's Cheryl Bush.
17 You're on mute.

18 MS. BUSH: Cheryl Bush has motive and intent.

19 THE COURT: Oh, you have motive and intent but not
20 mental state. Guess what, I could discuss it what I'm
21 thinking. Here's what -- I mean, somebody will come forward
22 and start talking in a minute.

23 But I think it's clear that -- I think this is the
24 motive and intent motion. But that plaintiffs' experts can't
25 testify about the motives of VNA, the CMI-Trading Inc. v

January 19, 2022

59

1 Quantum Air case says that the intention of the parties is not
2 an issue for expert testimony.

3 I should not have had a snack. I'm sorry.

4 And that -- and I don't think plaintiffs have said
5 that they're going to do that. So let's hear from Mr. Maimon.
6 Are your experts going to testify about the intention of VNA?
7 Did we lose, Mr. Maimon?

8 MR. CAMPBELL: He's on mute.

9 MR. MAIMON: I apologize, Your Honor. My answer is
10 not on direct examination, Your Honor.

11 THE COURT: Okay. And then on cross-examination of
12 VNA witnesses?

13 MR. MAIMON: So the reason that I phrase it that way,
14 Your Honor, is that one of the issues or one of the primary
15 issues that VNA has raised in its defense is the issue of the
16 scope of the services and the scope of their work. It's not
17 only a matter that they have argument on, but they have an
18 expert, Mr. Bellamy, who is devoted to talking about the scope
19 of the work.

20 And the issue about whether or not the duty is
21 outside the scope of the agreement or not is a matter that
22 Your Honor addressed in the summary judgment opinion. And so
23 that's obviously an important issue.

24 Mr. Bellamy together with the position of VNA is that
25 you had approximately two months of work with only a few weeks

1 at a site evaluation for only \$40,000 with a budget in time
2 that are significantly constrained. And VNA from the outset
3 has been saying it makes no sense that we would have a broader
4 scope of work given the time and the budgetary constraints
5 here. And therefore we have no duty. Which at this point the
6 Court has already dealt with. But we certainly have no breach
7 given that limited scope of work.

8 And so certainly we should be able to argue the
9 contrary with regard to the admissions by VNA itself that its
10 entire intent in taking this job was not to make the \$40,000
11 but to, quote, unquote, "upsell" in their own terms the City
12 of Flint in order to get bigger contracts, longer term
13 contracts, and more lucrative contracts. That rebuts and
14 explains the very defense that they are advocating.

15 It also rebuts the designations that they've put of
16 their former vice president that VNA went into Flint to,
17 quote, unquote, "do the right thing." That's what their
18 intent was and they've designated that testimony.

19 You can't have it both ways. You can't say, oh, we
20 were there to do the right thing and then say, but you can't
21 tell the truth that what we were really there to do is to
22 upsell to get a bigger contract and to make a heck of a lot
23 more money than the \$40,000, which was a loss leader.

24 THE COURT: The problem here is that some of that
25 testimony could be relevant regarding breach. But on duty, if

January 19, 2022

61

1 we're trying to figure out whether what the duty is --

2 MR. MAIMON: I agree.

3 THE COURT: Okay.

4 MR. MAIMON: This is not relevant to -- their mental
5 state is not -- again, this is the same as the argument before
6 about whether or not there's a heightened duty because of
7 their size or their sophistication or whatever. They have the
8 duty of care and the Court has already articulated that they
9 had the duty and what that duty is.

10 The question of whether or not they breached that
11 duty of care, their argument by way of their own experts and
12 by way of their arguments is that they didn't. And look at
13 what the scope of the work was. And therefore our failure to
14 do this or our failure to do that was not a breach of that
15 duty of care.

16 Now the Court has ruled that it's an issue of fact
17 for the jury to determine. But that's what it is. It's an
18 issue of fact. And all evidence related to those facts should
19 be appropriately put in front of the jury and we shouldn't be
20 constrained in doing that.

21 The reason that I had hesitated before, Your Honor --
22 and I apologize for the long road -- when the Court asked
23 whether or not we're going to have any of our experts give
24 opinions on that and I said not in their direct testimony,
25 what I meant by that is that I could foresee a situation

1 either on cross-examination or on redirect examination if the
2 issue gets put forward that, oh, there was this limited scope
3 and, therefore, there was no breach of that duty, the experts
4 know exactly what the situation was.

5 And to curtail the expert when the door has been
6 opened by the defense, I don't think is proper either. And
7 that's why I didn't want to give a simple no to that answer by
8 the Court.

9 But I think that the evidence of the motive, intent,
10 and mental state of VNA is relevant, number one, to the breach
11 of the duty given the defense that they've put forward. And
12 number two, it's relevant and it's actually relevant by --

13 THE COURT: So let me stop you and go back a step.
14 Explain to me how the scope of work opens the door to intent
15 testimony.

16 MR. MAIMON: Sure. The argument advocated by VNA and
17 its expert witness is that given the significantly constrained
18 -- and I'm reading. The budget and time were significantly
19 constrained. That's the language that their expert on
20 liability Mr. Bellamy, on standard of care by the way, gives
21 testimony, that that's how he defines the scope of the
22 services.

23 That's how he defines whether or not what they did
24 was reasonable in relation to that scope of the services. And
25 again, you can't look at it abstract. It's not a question of

1 a heightened duty of care. It's a question of given the scope
2 of the services, whether their actions or omissions
3 constituted a breach of the duty of care given that.

4 And they want to make that scope of the services so
5 small that nothing that they did could be a breach of the
6 standard of care with regard to it. And our point is that
7 it's not small like that and it's not small by their own
8 admissions. Because what they were doing is they were setting
9 up something so that they could have -- and I'm not being
10 critical of it. That's their business model. Their business
11 model --

12 THE COURT: The scope of the work is going to be in
13 the contract. So the scope of the work, everyone will know
14 what it is. And so I think what you're saying is VNA engaged
15 in misconduct of some sort, malfeasance, misconduct. They
16 didn't live up to that scope because they had a motive to get
17 another contract later, so they downplayed expenses and
18 expenditures and things that would need to be done.

19 Is that what you're saying?

20 MR. MAIMON: I'm saying -- I'm saying two things,
21 Your Honor. I'm saying, number one, is there is no
22 stipulation as to what the scope of the services were. VNA
23 through its own witnesses has tried to narrow the scope of the
24 services that were due to the city under its engagement in
25 Flint.

1 Even when cross-examined with the contract, their
2 witnesses say, oh, yeah, but we had an understanding with the
3 city that the scope was much more narrow. It was limited to
4 TTHM. But the documents don't say that. Yeah, but that was
5 the understanding.

6 And they're entitled to raise that defense. But you
7 can't be raising a defense which narrows the scope of your
8 services in order to not allow anything that you do to be a
9 violation of the standard of care and not allow the full
10 story.

11 Why did -- why did they do this? Why did -- you
12 know, one of the issues that we're entitled to show the jury
13 is not only what they did but why they did it. And the fact
14 that they were from the outset saying that they were only
15 interested in a long term deal, that's the only reason that
16 they were doing this. That they wanted -- in their words.
17 Not mine. I'm not putting any spin on this.

18 They wanted to upsell the City of Flint for a longer
19 term and more lucrative contract. It rebuts the very, defense
20 that's being put forward. It does other things but I think
21 that answers Your Honor's question.

22 THE COURT: Okay. All right. Ms. Bush.

23 MS. BUSH: Yes, Your Honor. What I have heard kind
24 of runs a few things together in my mind. There is certainly
25 a factual dispute based on the record about what the scope of

January 19, 2022

65

1 work is.

2 THE COURT: Yes.

3 MS. BUSH: But I don't understand and I just don't
4 follow the logic of how that relates to somebody saying in
5 deposition that they wanted to do the right thing. I don't
6 understand how that relates to any other motive or intent that
7 they have talked about that they have discussed bringing in.
8 So I'm at a loss.

9 THE COURT: Okay. I think what I'm understanding is
10 that for plaintiffs, the motive of upselling for the big
11 contract in the future or the hope that that would be the
12 outcome of this work is part of the story of what went wrong.

13 It's not going to affect what the scope of the work
14 is. We'll have the contract, which is pretty vague. We'll
15 have testimony that it's limited to TTHM. You know, we'll
16 have all of that. But in the course of this testimony, we may
17 or may not -- I don't know -- learn why certain decisions were
18 made.

19 Plaintiffs allege that VNA did not adequately bring
20 corrosion control to the attention of the City of Flint and
21 those in charge of the water treatment. And plaintiffs'
22 theory is developing as there's a reason for that. The city
23 might like them more for the future if they didn't prominently
24 pursue corrosion control advice which is expensive.

25 So from my perspective, intent is not going to impact

1 what the definition is of the duty, what the jury is
2 instructed to consider under duty.

3 But to the extent evidence about motive to get the
4 big next contract is brought in, I think that is relevant.
5 And I'm just reminded here that relevance is any tendency to
6 make the existence of any fact that is of consequence to the
7 determination of the action more or less probable than it
8 would be without the evidence.

9 And in the Sixth Circuit, we have a very liberal
10 relevancy standard under United States v Ramer, R-A-M-E-R.
11 And so I don't think that it's substantially more prejudicial
12 than probative or any of the arguments that have been made to
13 be able -- to tell the story of what the witnesses have
14 already testified to in their depositions.

15 MS. BUSH: May I respond, Your Honor? May I say
16 something please?

17 THE COURT: Certainly. Yes.

18 MS. BUSH: Just because a witness is testified to
19 something doesn't make it admissible.

20 THE COURT: No, no.

21 MS. BUSH: And also just because it's part of a story
22 that someone wants to put forward, that doesn't make the
23 evidence admissible.

24 THE COURT: No, Ms. Bush. And what does make the
25 evidence more admissible is if it has any tendency to make the

January 19, 2022

67

1 existence of any fact of consequence to the determination more
2 or less probable. So that's the standard that will be
3 applied. And taking into consideration whether certain
4 testimony is more prejudicial than probative.

5 So and I don't see here that the testimony that
6 Mr. Maimon set forth would not meet the standard of relevance
7 or would meet the standard of more prejudicial than probative.

8 MS. BUSH: Well, it is an objective standard that is
9 the standard of care.

10 THE COURT: Yes.

11 MS. BUSH: So subjective thoughts, whether part of
12 the story or not that one party wants to tell, don't bear on
13 whether or not there's been a violation of the standard of
14 care. What's relevant is what VNA actually did.

15 MR. MAIMON: Your Honor, if I can point out?

16 THE COURT: Sure.

17 MR. MAIMON: We're not arguing for a different
18 standard of care.

19 THE COURT: No, I know.

20 MS. BUSH: Understood.

21 MR. MAIMON: As an example, within VNA there were
22 disagreements. There were the technical engineers of VNA who
23 were saying we should not take this job because it's not --
24 the goals of the city are not attainable.

25 We should telling them switch back to Detroit. We

1 should be telling them of the need to do all these things.
2 And we should not let the, quote, unquote, "business
3 development side" whose motive and intent was to upsell, was
4 to have the larger contract, was to have the long-term
5 contract be dictating what is told the client.

6 Ultimately that's who won out. But if you don't --
7 that's part of the story of what VNA -- in Ms. Bush's words,
8 that's what VNA did. That's what they were discussing
9 internally. That's what they said. Their own engineers said
10 we have to tell them to move back to Detroit.

11 Now it's our contention that the failure to do that
12 was a breach of the standard of care. But explaining to the
13 jury why they did it is an important part of the story.
14 Because if we simply say it was, that doesn't -- the relevance
15 is that it supports the contention and it makes sense of the
16 whole thing, which we're entitled to do. We're not
17 constricted to simply saying, well, this is our opinion.

18 THE COURT: Let me put it this way. If I -- what I
19 hear from Mr. Maimon and what I understand from what Ms. Bush
20 is objecting to, that if there's testimony that VNA had a
21 motive not to warn the city about corrosion control, that
22 would be evidence that could make it more likely than not that
23 they did not warn.

24 And VNA is saying we did warn. And plaintiffs are
25 saying you didn't warn. And so it would be a fact that would

1 make it more likely than not, maybe not very likely. We'll
2 have to find out what -- how it comes in. But it's certainly
3 -- if there's a motive not to warn, that could make it more
4 probable and meet the relevancy standard that your client did
5 not warn.

6 So and again the relevancy standard is low. So this
7 motion is essentially denied. Although I think -- I will say
8 this, that as the trial unfolds, I think this is one where
9 plaintiffs pointed out that this was a very broad motion in
10 limine and not really what motions in limine are usually used
11 for, which is targeted types of evidence or -- so you can
12 re-raise as you get to certain arguments. If you think it's
13 inappropriate, I am certain you will object to it and give me
14 the reasons why.

15 So plaintiffs motion number 507 to exclude evidence
16 of indictments and nolo pleas.

17 MR. MAIMON: That will be me, Your Honor.

18 THE COURT: Okay.

19 MR. MAIMON: And then hopefully the Court will have
20 heard enough from me for today. Mr. Stern will take over.

21 So now looking at the responses of the defendants, it
22 seems that their position is limited in three ways with regard
23 to the admissibility of such evidence. Number one is they
24 limit themselves to witnesses at trial. Namely that a witness
25 who testifies at trial puts their credibility at issue and

1 evidence of indictments may be relevant to the issue of bias
2 of a witness. And I'll address that in turn.

3 But it seems that that is -- that they acknowledge
4 that there is no independent basis of admissibility of either
5 convictions or nolo contendere pleas or, of course,
6 indictments.

7 The second part is that they, in their arguments,
8 talk about testimony that it would be relevant with regard to
9 testimony that's contrary to the indictment. In other words,
10 that you're giving a different story here and, therefore,
11 talking about the bias.

12 And in talking about bias, they talk about the
13 tendency that a witness might have to, quote, unquote, "alter
14 their testimony" because they -- and again, that goes back to
15 the testimony being inconsistent with something else. And in
16 that way I'd like to talk about -- talk about that.

17 If one looks at the defendants' papers, if one looks
18 at the defendants' papers and takes a look at the indictments
19 that they seek to put in front of this jury, the first thing
20 that struck me is the indictments for manslaughter.

21 And how inconsistent is the desire by the defendants
22 to put into evidence an indictment for manslaughter by various
23 individuals when the Court has already ruled that the health
24 conditions that our plaintiffs have not experienced can't come
25 into evidence because of the 403 prejudice that's there? How

1 could it be that the dangers of lead poisoning that are
2 acknowledged but we can't put into evidence because our
3 clients don't currently have them, and we don't have an
4 expert, will say more likely than not that we will have them
5 can't come into evidence? But manslaughter, which none of --
6 thank God none of these kids are dying --

7 THE COURT: Let's find out if defendants intend to do
8 that.

9 MR. CHRISTIAN: Good afternoon, Your Honor,
10 Mr. Maimon. Marcus Christian on behalf of VNA.

11 That is not the purpose of this. And specifically
12 one thing I want to point out -- and it's not necessarily with
13 respect to what Mr. Maimon is saying directly. But it's with
14 respect to the whole -- their argument with respect to
15 hearsay.

16 This is not being put forth for the truth of the
17 matter asserted in the indictments. The purpose here is that
18 these individuals have charges that are pending against them
19 that could have significant impact on their lives. And the
20 fact that that is the case could affect their testimony.

21 And the idea of altering their testimony could be
22 alteration with respect to the truth to the actual events as
23 they recall and having a biased that would make them want to
24 improve their situation with respect to their indictments.

25 THE COURT: Yes. And I'm not sure that's what

1 Mr. Maimon addressed. So thank you for bringing that up.

2 Mr. Maimon, what I understand is it's not -- VNA is
3 not concerned about inconsistency. They're concerned about
4 the witness who's facing criminal charges, motivation to
5 minimize their own conduct because of the risk of the criminal
6 indictment.

7 MR. MAIMON: Right.

8 THE COURT: But let me ask a predicate question,
9 which is that have you explored whether these witnesses intend
10 to testify at trial? I do not recall exactly what we agreed
11 upon with respect to the depositions. Or do they intend to
12 take the fifth?

13 MR. MAIMON: So some of the ones that are listed in
14 the defense papers are on our witness list. Others are on the
15 defense witness lists. I think it's -- it makes a difference
16 if the defendant calls a witness only to then -- under guise
17 of impeachment offers evidence that would be otherwise
18 inadmissible that is frowned upon by the courts.

19 There are some witnesses who are on our witness list.
20 Mr. Croft, Mr. Ambrose, former Governor Snyder. I don't
21 remember who else. But there are some who are on our witness
22 list who have indictments pending against them.

23 The thing that I would say, Your Honor, is that if
24 you look at the caselaw, and especially the case law that the
25 defendant cites -- and let me just get it up a minute. Yes.

1 So one of the cases that they cite -- and this is on page 10
2 of their opposition brief -- is the United States v Maynard
3 case, 476 F.2d 1170 at 1174. That's a 1993 case out of the DC
4 circuit.

5 If you look at that case, it's instructive in that
6 the circuit court there held that there are circumstances,
7 like the cases say, where indictments may be relevant to bias.

8 However -- and I was surprised that it wasn't in
9 their papers. What that circuit held was that the indictment
10 evidence against that witness was improper because it was --
11 they said we are persuaded by appellate's argument that the
12 prejudicial effect of the admission of the arrest and charge
13 in this case outweighed its probative substance. The witness
14 being charged, quote, with a crime was probative of no more
15 than the prosecutor's or grand jury's --

16 THE COURT: I hear you. While you're looking at
17 that, let me just ask a quick question of VNA of whether they
18 intend to introduce the actual indictment or the content of
19 the charges? Or can you agree to limit your questioning to
20 the existence of an indictment?

21 MR. CHRISTIAN: I think we certainly are willing to
22 explore the existence of the indictment, Your Honor. I think
23 getting too much until depth with the particular charges,
24 especially given that we're not going -- we don't intend to
25 introduce it for the truth of the matter asserted, is beside

1 the point.

2 THE COURT: Right. And are all of those witnesses
3 who are on either side, are they misdemeanor charges that are
4 now pending?

5 MR. CHRISTIAN: Some are misdemeanor and some are
6 felony.

7 THE COURT: Okay. So Mr. Maimon, if VNA limits the
8 question to, are you facing misdemeanor charges; are you
9 facing a felony charge; or just are you facing an indictment,
10 do you have any objection to that? Because there is -- the
11 issue of bias, I think it's referenced at least in -- once or
12 so in the Sixth Circuit that under appropriate circumstances
13 an indictment may be introduced to show the bias of the
14 witness.

15 MR. MAIMON: Yes. And what that was, Your Honor,
16 that is the NLRB.

17 THE COURT: It is, yes.

18 MR. MAIMON: Sixth Circuit in 1978. And that was in
19 a footnote where the footnote simply referred back as a
20 general matter to a DC circuit case and said -- said as
21 follows. And again, the second sentence was not included in
22 the defendants' brief. It says, under appropriate
23 circumstances, an arrest or indictment may be introduced to
24 show the bias of the witness. But it goes on to say, since
25 the company never sought to introduce these convictions for

1 the purpose of showing bias, we have not considered whether
2 they would have been admissible for that purpose in this case.
3 And so that's not a holding in the Sixth Circuit --

4 THE COURT: Right.

5 MR. MAIMON: -- that it's admissible testimony.
6 That's the Sixth Circuit saying the DC circuit has allowed it.
7 This issue is not before us. And so this is -- I mean, I
8 remember back in law school they taught us the difference
9 between a holding and dicta. This is, by its very definition,
10 dicta.

11 There's another case out of the DC circuit that's
12 quoted by Maynard. It's the Magill (ph), 106 US APP DC 136.
13 And it's a 1959 case. And what the court, trial court did,
14 which was affirmed in that case, was it allowed the
15 prosecution -- it allowed the witness to be cross-examined
16 with the previous charge, with another charge, only to the
17 extent with regard to promises of leniency.

18 THE COURT: Um-hum, yes.

19 MR. MAIMON: However, the Court upheld the trial
20 Court's ruling saying that bias could not be shown simply by
21 testimony of an arrest where no conviction has resulted and
22 where no showing is made of promises of leniency or the like.
23 That's at 106 US APP DC at 137. The F.2d cite is 270 F.2d at
24 330.

25 And so here we have no convictions. We have no

1 promises of leniency. We have no plea deals of any sort. And
2 again, we're only talking about indictments and we're only
3 talking about trial witnesses.

4 And so the cases that the defendant cites are in
5 opposite. And I think that both the Maynard case and quite
6 frankly the Magill case, it's really the 403 analysis as to
7 whether or not the prejudice outweighs the probative value of
8 the potential bias.

9 And I'll tell you one aspect which distinguishes our
10 case from every case cited by the defense and I think is
11 actually dispositive. In those cases, which are primarily
12 although to a certain extent otherwise, but primarily criminal
13 cases, you're talking about a witness who comes in and gives
14 testimony.

15 Here you have a party whose fault VNA is asserting
16 against it. And so the risk of the prejudice here is
17 magnified and multiplied exponentially because --

18 THE COURT: But the risk of that VNA is identifying
19 is that the witness is facing this criminal proceeding in the
20 future after our trial. There have sworn testimony. And they
21 might be biased or motivated to downplay their responsibility
22 and up play VNA and LAN's -- LAN's responsibility to shift
23 blame from themselves to the defendants who are at trial.

24 MR. MAIMON: I understand that that's what it is.
25 But that's not what any of the cases deal with. All the cases

1 never deal with that -- VNA has a direct claim that let's take
2 Mr. Ambrose. Mr. Ambrose is liable under its third -- notice
3 of third party at fault. And the prejudice that results from
4 that indictment testimony is that their claim is more
5 believable because of it.

6 In the standard situation that the circuit courts
7 have dealt with, it has nothing to do with the claims at
8 trial. It has to do with the bias and credibility of the
9 witness. Here because VNA maintains the claim against these
10 very people and is going to submit them to the jury, the
11 prejudice -- and this is in some ways what the Magill and the
12 Maynard cases dealt with.

13 The prejudice outside of the slight probative value
14 on bias is that, oh, they were charged with this? They must
15 be liable and therefore at the end of the case when the jury
16 has to check that box, there's a box for them to check off.
17 That's never been the case where any of these courts have ever
18 dealt with this issue. And I think that is the most
19 dispositive issue on a 403 analysis.

20 THE COURT: That's interesting. I do think that's
21 very interesting. And so let me ask Mr. Christian how -- so
22 I've got to look at whether it's more probative than
23 prejudicial. And how probative is it that anyone who's being
24 accused of someone -- something generally wants to make
25 themselves look better rather than worse?

1 MR. CHRISTIAN: Yes.

2 THE COURT: But why doesn't that apply to everybody
3 has some bias in terms of being accused of misconduct?

4 MR. CHRISTIAN: So Your Honor, I can point at -- I
5 can highlight that a number of ways. One of them is that when
6 Mr. Maimon seeks to distinguish the idea of having a lower
7 sentence from the -- the idea of having a sentence at all gets
8 beside the point that you're facing criminal consequences.
9 One of the things that Mr. Maimon said in earlier argument I
10 think underscores this to some extent as well.

11 He said that being a defendant in a civil suit is
12 essentially the same as an indictment. And you face criminal
13 defendants all the time. It's not the same. He doesn't --
14 when someone is indicted, they face loss of liberty. They
15 face the loss of rights. Potentially the right to vote, the
16 right to be on a jury, the right to bear firearms.

17 THE COURT: Right.

18 MR. CHRISTIAN: A number of rights that they face.
19 It is not the same. It is -- it has a different penalty. It
20 has a different threshold. Beyond a reasonable doubt. It is
21 very serious. And each of these potential witnesses have that
22 at stake.

23 And that is a significant fuel for their potential
24 bias. Because that is -- in the greatest sense that's the
25 most important case to each and every one of them is their

1 prosecutions. And so we say that that is very important and
2 that is what is missed by Mr. Maimon's argument, Your Honor.

3 MR. MAIMON: Your Honor --

4 THE COURT: Let me do this. I think what I should do
5 is take this one under advisement, look at these additional
6 cases that Mr. Maimon has pointed to, take into consideration
7 the argument. But go ahead, Mr. Maimon.

8 MR. MAIMON: The only other item I was going to add,
9 Your Honor, is that there is nothing inconsistent with VNA
10 and/or LAN having civil liability to the plaintiffs,
11 especially under our fault sharing statute in Michigan. And
12 the indictments and the claims in the indictments. In other
13 words --

14 THE COURT: Right.

15 MR. MAIMON: They're not mutually exclusive.

16 THE COURT: No, they're not.

17 MR. MAIMON: So Mr. Ambrose can be criminally liable.
18 He can be guilty of the crimes charged in the indictment. And
19 that has nothing to do with whether or not VNA or LAN is
20 liable under civil liability to the plaintiffs.

21 And so it's not a simple matter, well, they're a
22 witness in this case and they might have liability and,
23 therefore, you tell a jury that they've been indicted and
24 they've been charged with these things. Those two things can
25 coexist.

1 And I think that that is number -- also
2 distinguishing. But it's also distinguishing as far as the
3 403 analysis. Because what this does is it tells the jury
4 that the criminal justice system, the U.S. Attorney or whoever
5 it is issued an indictment for this person to be responsible
6 for the Flint water crisis. And therefore, when it comes time
7 to fill in the jury verdict form, you answer yes.

8 And there's no one doing that prejudice. There's no
9 curative instruction that says this is only to determine their
10 bias but you're not to determine whether or not they're
11 responsible with it. That only underscores the purpose of it.
12 And you know, if you need anything, you take a look at the
13 language that VNA uses to talk about the cloud -- how do they
14 call it? The cloud of -- the cloud of indictment.

15 MR. CHRISTIAN: Your Honor.

16 MR. MAIMON: That's not an issue. That's straight
17 out of their papers. That's not an issue of we want to talk
18 about bias. That's we want to blame them.

19 THE COURT: Okay. Mr. Christian.

20 MR. CHRISTIAN: Your Honor, I think we would
21 stipulate that we won't use the cloud of indictment in the
22 trial. And I'd like to also add that you can add a limiting
23 instruction so that the jurors understand that they're not
24 supposed to be looking at the fact that these individuals have
25 been indicted to indicate that the indictments are anything

1 beyond charged.

2 As you know, as they all know, they're innocent until
3 proven guilty. So to the extent that Mr. Maimon is suggesting
4 that there's not necessarily any overlap between the criminal
5 and the civil, I don't think there's any dispute that the
6 testimony that will be given at this trial by these
7 individuals could be relevant to their criminal cases.

8 And so that fact not being in dispute is as the heart
9 of why we think it's important to demonstrate bias and to be
10 able to adequately examine these witnesses at trial, Your
11 Honor.

12 THE COURT: Okay. --

13 MR. ERICKSON: Your Honor, Philip Erickson.

14 THE COURT: Let me make sure of one thing. Yes,
15 Mr. Erickson, I know you have a whole different argument --
16 angle on this. So I'll let you discuss that in a minute.

17 MR. ERICKSON: Thank you.

18 THE COURT: But I want to make sure, Mr. Maimon,
19 plaintiffs do not agree that to allow defendants to say, and
20 Mr. Ambrose, are you facing an indictment or a criminal charge
21 or a misdemeanor complaint about this. Related --

22 MR. MAIMON: Basically that's what the testimony was
23 in the Maynard case.

24 THE COURT: Okay.

25 MR. MAIMON: The witness was on the stand. They said

January 19, 2022

82

1 you were arrested. You're charged with obstruction of
2 justice. And the Court held that it was error.

3 THE COURT: Okay. All right. I'm going to take
4 another look at this argument and I'm going to let
5 Mr. Erickson make his argument, which --

6 MR. CHRISTIAN: May I make just one last point, Your
7 Honor?

8 THE COURT: Sure.

9 MR. CHRISTIAN: Just to highlight. And I know you'll
10 look at it closely. But Mr. Maimon, one of the things he
11 pointed out in referring to that case over and over again, is
12 that in that particular case, they made reference to the
13 actual charges. Here, we're talking -- to the nature of the
14 charges. Here we're talking about the fact of being charged.

15 So to the extent that that's relevant to your
16 consideration, I definitely wanted to point that out.

17 THE COURT: Okay. Thank you. Okay.

18 So Mr. Erickson, you're suggesting that the evidence
19 is admissible under Rule 807 and of an indictment and that
20 nolo pleas are admissible as a statement against interest.
21 Are you still pursuing both of those arguments?

22 MR. ERICKSON: We're really focusing on 807, Your
23 Honor.

24 THE COURT: Okay.

25 MR. ERICKSON: We believe that the existence of some

January 19, 2022

83

1 of the charges are very relevant to the defenses of LAN. And
2 in particular, we have focused in the brief on the charges
3 against Mr. Glasgow, Mr. Prysby, and Mr. Bush.

4 Mr. Glasgow is charged with falsely certifying that
5 the samples that were submitted were Tier 1 samples when he
6 had no information about where the samples came from. Tier 1
7 samples, as I think the Court knows by now in this case, are
8 samples that are from lead service line locations.

9 Mr. Glasgow, Mr. Prysby, and Mr. Bush were all
10 criminally charged with together deciding to eliminate high
11 test results from the test results that were reported under
12 the lead and copper rule. Thereby causing the testing results
13 to be lower than the action limit when they would otherwise
14 have been probably higher than the action limit.

15 THE COURT: So you're seeking to admit this evidence
16 for the truth of the matter asserted?

17 MR. ERICKSON: Yes.

18 THE COURT: And you're saying, okay, so we look at
19 Rule 807 and these -- a statement that would otherwise be
20 hearsay has to be supported by sufficient guarantees of
21 trustworthiness and may be admissible, even though it would
22 otherwise be hearsay, if it is more probative on the point for
23 which it is offered than any other evidence that the proponent
24 can obtain through reasonable efforts.

25 And you have all the evidence.

January 19, 2022

84

1 MR. ERICKSON: Your Honor, and I appreciate that.

2 THE COURT: You have everything you just said to me.
3 You have it. So I don't see how this possibly reaches that
4 standard.

5 MR. ERICKSON: Well, Your Honor, the -- you're
6 correct. Mr. Glasgow has admitted in his deposition that he
7 falsely submitted the information to the MDEQ.

8 THE COURT: Then why do you need hearsay evidence for
9 that also?

10 MR. ERICKSON: Well, Your Honor, the Court has cited
11 in its recent decision in the VNA case about, you know, the
12 precedent in Michigan that criminal misconduct of a defendant
13 is superseding intervening conduct as a matter of law.

14 THE COURT: But this is --

15 MR. ERICKSON: So the fact of the criminal charges is
16 itself relevant to our defense.

17 THE COURT: But that's not what -- this is charges.

18 MR. ERICKSON: But Your Honor --

19 THE COURT: These are charges.

20 MR. ERICKSON: But the charges have been verified
21 both by the plea but more importantly by his testimony in the
22 case.

23 THE COURT: I do not think your argument can win the
24 day on this. Because you have certain testimony and you are
25 then going to be trying to tell the jury that this testimony

1 is a crime and we have shown it beyond a reasonable doubt.

2 And so I don't know how you can do that.

3 I think you have the evidence you want to be
4 admitted. You've got it in the deposition testimony. So
5 you've got a witness who's going to testify to it or have to
6 be impeached. And so you don't meet the standard in 807. So
7 I don't think you can do this.

8 MR. ERICKSON: Right. I understand the Court's
9 ruling. Thank you.

10 THE COURT: And if you -- if what you're suggesting
11 is that by the end of the case if criminal conduct could be an
12 intervening superseding intervening cause, that the Court has
13 to determine before the end of the trial, whether Mr. Glasgow
14 or whoever we're talking about at the time, has violated a
15 criminal law. Is that what you're suggesting?

16 MR. ERICKSON: Well, Your Honor, it is already a
17 subject of a pending motion for summary judgment. But based
18 on the Court's ruling with respect to VNA's motion for summary
19 judgment, we understand that the Court may find an issue of
20 fact.

21 THE COURT: Yeah.

22 MR. ERICKSON: I don't know how a jury makes a
23 determination about whether criminal misconduct constitutes an
24 intervening superseding act if they don't know that the act
25 was, in fact, criminal.

January 19, 2022

86

1 THE COURT: Yes. But the jury -- we're not having a
2 criminal trial here. That's the problem. So I mean we may
3 need to discuss this further. I mean, you pose a good
4 question. So I don't fault you for the question.

5 But so we'll cross that bridge either at the summary
6 judgment stage trying to sort out what has been shown. But it
7 won't be a decision for the jury to make. They won't be
8 making a decision as to --

9 MR. ERICKSON: And I'm not asking that the jury be
10 asked to decide whether the conduct was criminal. The charges
11 were made. A plea was entered. Mr. Glasgow admitted in his
12 plea that he had made misstatements to the MDEQ about the
13 sampling. And Mr. Glasgow has admitted in his deposition in
14 this case that he falsified the information that he submitted
15 to the MDEQ. But there's no question that he did what was
16 alleged.

17 THE COURT: Right.

18 MR. ERICKSON: And therefore, I think there's a
19 reason -- that it's clear that his conduct was criminal. He
20 plead no contest to a crime. But importantly in doing so, he
21 admitted the underlying act which was charged.

22 THE COURT: I hear you. Well, I'll take your
23 argument into considered and certainly be looking at it in
24 making the summary judgment decision and sorting out what
25 comes in. So I appreciate that. And I don't know if

1 Mr. Maimon wanted to say more on this argument.

2 MR. MAIMON: All I'll say, Your Honor, is that to the
3 extent that he made admissions, those admissions either he
4 will make them again on the stand or he'll be impeached with
5 his prior admissions. But once the admission is made in the
6 record in this case, the indictment adds nothing to it.

7 All it adds is that a government official is now
8 charging based on that. It has nothing to do with the truth.
9 The truth of the matter asserted is the admission. And that's
10 why the Rule 807 says that you can't -- one of the
11 prerequisites is that you don't have testimony or evidence
12 from some other source.

13 THE COURT: Right.

14 MR. MAIMON: The very truth of the matter is admitted
15 to, so it can't be admissible under that rule.

16 MR. ERICKSON: Your Honor, couple of quick points.

17 THE COURT: Sure.

18 MR. ERICKSON: One is that the plaintiffs pled all of
19 these charges in their complaint at paragraph 393. And you
20 know, if the defendants hadn't settled, very likely it would
21 be the plaintiffs seeking to use this information. Secondly,
22 the plaintiffs have alleged all of the misconduct that I've
23 referred to in my brief and here today in their complaint in
24 paragraphs 194, 195, and 196.

25 So these are averments made by the plaintiffs also.

1 MR. MAIMON: Yes, Your Honor. And our fault sharing
2 statute is very clear that to the extent that the defendant
3 wishes to assign fault to anybody else, any nonparty, the
4 defendant has the burden at this point in time. It's not the
5 plaintiff that has the burden. And the fact that in a
6 pleading we made an assertion, again, we would be bound by the
7 same rules of evidence. We're not asking -- we're not saying
8 that the rules of evidence apply differently to us.

9 THE COURT: Right. Yeah.

10 MR. MAIMON: If we had Mr. Glasgow we were
11 prosecuting, again Rule 807 would not be a basis to admit the
12 indictment testimony. His admission is the evidence.

13 THE COURT: Okay.

14 MR. ERICKSON: Your Honor, just one quick final note.

15 THE COURT: Okay.

16 MR. ERICKSON: We cited two cases in which the
17 courts, the Sixth Circuit and the Ninth Circuit used Rule 807
18 to admit pleas. Both of those pleas were guilty pleas. But
19 we don't believe it would make a difference where there's no
20 question but that Mr. Glasgow has admitted the underlying
21 conduct which was charged.

22 THE COURT: Okay. I saw that. Thank you.

23 MR. ERICKSON: Thank you.

24 THE COURT: So I'll take this motion under advisement
25 and issue a written decision.

1 So let's look at 511 which is plaintiffs' motion to
2 exclude investigative reports. And here we're looking at the
3 Flint Water Advisory Task Force report and the EPA's Office of
4 Inspector General OIG report.

5 And here's what I'd like to suggest. We're kind of
6 -- this has been quite a long argument. And as I look at
7 these reports, there are portions of them that I think cannot
8 be admitted for the very -- for reasons that I can articulate
9 more but I'm still interested in your argument. But what I
10 don't know now is speaking to VNA what portions of these
11 reports you're seeking to have entered.

12 So some portions may meet the reliability standard
13 that's required here and some may not. But I don't know what
14 portions you're seeking.

15 MR. NGUYEN-DANG: That's me, Your Honor.

16 I think at this time we don't know exactly which
17 portions. I think the way that we had envisioned these being
18 used would depend on how the trial unfolds. I think we
19 envisioned that the parties would use the reports in examining
20 expert witnesses, government officials, other witnesses and
21 would use the specific parts of the reports that are relevant
22 to that witness's testimony. But as I said, that depends on
23 the progression at trial.

24 I will say that our position -- and I understand what
25 Your Honor just said. Our position is that all of the report,

1 every part of the reports should be admissible under Rule
2 8078.

3 THE COURT: Okay.

4 MR. NGUYEN-DANG: I apologize. 8038.

5 MR. WITTIE: That's also LAN's position. And I think
6 that it's important here to bear in mind what procedural stage
7 we're at. The defendants have not made a tender of these
8 reports for any purpose at this time. It's basically the
9 plaintiffs' position that they're not admissible for any
10 purpose under any circumstance.

11 And you know, unless they can show that, their motion
12 in limine ought to be denied, you know, without prejudice
13 perhaps with respect to any particular tender that might be
14 made. But you know, until that time, it's a little premature
15 just to guess exactly for what purpose that these reports
16 might be sought to be admitted by either of the defendants.

17 THE COURT: Okay. Who is responding or who is
18 arguing this motion for the plaintiffs?

19 MR. STERN: Your Honor -- sorry, Your Honor. That
20 would be me.

21 THE COURT: Okay.

22 MR. STERN: I mean, in light of what Your Honor said
23 and in light of the representations made by both defendants,
24 in particular counsel for VNA, that they plan on using the
25 entire report, the two best arguments that I think the Court

1 really ought to focus in on are that the trustworthy factors
2 with regard to the Flint Water Task Force, they're just not
3 met.

4 I mean, there wasn't a single hearing held. Every
5 finding, to the extent these are findings, was heavily based
6 on hearsay. The report acknowledges the fact that it's
7 incomplete and was issued in 2016 long before other facts
8 about the corpus of this litigation came to pass. The task
9 force advisory -- you know, the task force itself were
10 comprised of individuals who had little to no investigative
11 experience.

12 I think that secondly, Rule 403 really comes into
13 play here. And the In Re 911 litigation is somewhat
14 instructive. You know, large sections of that report couldn't
15 be admitted in full. The Court was aware that the jury might
16 unfairly defer to such an authoritative seeming document
17 because it is human nature to rely upon an opinion carrying
18 the imprimatur of an entire state.

19 To the extent that Mr. Wittie, you know, jumped in to
20 talk about how premature it is, it should be noted that LAN,
21 as part of the investigation to the extent there was one,
22 insisted on answering questions to the extent it would answer
23 questions from the committee in writing and wouldn't even
24 appear.

25 And so for all of those reasons -- and frankly,

1 Judge, not knowing how and in which ways these defendants
2 intend to utilize the report until now -- and Mr. Nguyen-Dang
3 actually confirmed our fears that it's their intent to use the
4 report and it sounds like they'd like to admit the entire
5 report. We just don't believe it's an appropriate document.

6 And you know more than anything, the prejudicial
7 power of a document that was completed in 2016, that was
8 focused on the state, that had one of the defendants not even
9 participate in a way that was initially requested, an
10 investigation done by folks who had never done one before
11 relying primarily on hearsay, I can't envision a scenario
12 under which this document comes in other than to try and
13 convince a jury that the folks named in this document are the
14 ones at fault. And the folks not named in the document are
15 not at fault.

16 And that's not a permissible use of the document
17 under any circumstances, let alone the ones I've already
18 described.

19 THE COURT: Here's my thought on this, which is that
20 I think for the rationale that was set forth very clearly in
21 the In Re September 11th case, that the entire entirety of
22 both reports cannot be admitted.

23 If I look at the factors set forth originally in the
24 beach aircraft case, I think that we don't have all of those
25 factors met. Or I guess I'm looking initially at the Dortch v

1 Fowler that cites Miller v Field timeliness of the
2 investigation, special skill or experience of the official or
3 officials, whether a hearing was held, and the level at which
4 it was conducted, and possible motivation problems. I think
5 all of those factors do not weigh in favor of admitting the
6 entirety of both reports.

7 And but here's -- plaintiffs note that there's
8 hearsay within hearsay contained in these reports. There are
9 many reasons why they could be misunderstood or misused by a
10 jury.

11 So I think what I'd need to do at this point is grant
12 the motion to the extent that the full reports will not be
13 admitted. But I'd like VNA and LAN at a later date to
14 designate the portions that they think they will need. And I
15 will then determine whether those portions meet the
16 reliability standards set forth so that they can be admitted
17 or not. I have no pre decision about that at all.

18 I think the issue here is that I don't know when
19 these reports -- are you intending them, starting with VNA, to
20 be used for cross-examination of the plaintiffs' witnesses?

21 MR. NGUYEN-DANG: I'm not sure at this point, Your
22 Honor.

23 THE COURT: Okay. I'm just trying to get a timing.

24 MR. NGUYEN-DANG: No. I don't understand Your
25 Honor's ruling. We disagree with it and I might make a few

1 points if I might. But I think given Your Honor's ruling,
2 assuming it doesn't change, then I think what we would do is
3 we will advise the Court, you know, if a witness comes up and
4 we think we are going to try to use it then we'll do it at
5 that point.

6 THE COURT: Okay. And Mr. Wittie?

7 MR. WITTIE: Well, like the situation with VNA, we've
8 not yet made a determination as to exactly when and how the
9 report would be used. And we can certainly give advance
10 notice of our intent to do so. And with respect to what, you
11 know, portions of it that we might attempt to use.

12 THE COURT: So neither VNA nor LAN intend to use --
13 reference these reports in your opening statements? Mr.
14 Nguyen-Dang?

15 MR. NGUYEN-DANG: I'm not sure, Your Honor.

16 THE COURT: Then we have a problem.

17 MR. ERICKSON: Your Honor, Mr. Mason is not able to
18 be on the -- in the hearing today and he's the only one who
19 could answer the question from our team at this time.

20 THE COURT: Okay.

21 MR. ERICKSON: We'd be happy to follow-up and provide
22 that information to the Court.

23 MR. CAMPBELL: Your Honor, if I may? I don't mean to
24 double team.

25 THE COURT: Sure.

1 MR. CAMPBELL: I would believe that we would want to
2 use some portions of the task force and maybe the OIG reports
3 in our opening so.

4 THE COURT: Okay. Then what I need to know is what
5 portions. When do you want to get that to me? Starting with
6 Mr. Campbell.

7 MR. CAMPBELL: So we want to get it to you in time so
8 that you have enough time to get it -- to look at it, which we
9 understand is very difficult given everything that's going on.
10 So I hesitate to throw it back on you, Your Honor. But given
11 that we're probably going to open some time maybe the Monday
12 after the 14th or something like that in February, if we were
13 to get you something by perhaps February 1, is that enough
14 time for Your Honor?

15 THE COURT: That's perfect. That's perfect.

16 MR. STERN: And obviously, Your Honor, we would like
17 the opportunity after seeing -- you know, perhaps we have no
18 objection. But perhaps we might depending on what's
19 designated. And we'd like the opportunity to respond once we
20 have seen it.

21 THE COURT: Okay. Of course.

22 MR. STERN: Since we'll be meeting on I believe it's
23 February 9 in Ann Arbor on the pretrial, perhaps we can get
24 you our response Monday, February 7 to whatever may be
25 provided by Mr. Campbell on February 1. So a little less than

1 a week.

2 THE COURT: That's good with me. And we'll dispense
3 with a reply. So Mr. Wittie, that's agreeable, the 1st and
4 the 9th?

5 MR. STERN: 1st and the 7th.

6 THE COURT: 1st and the 7th, right. And the hearing
7 on the 9th, right.

8 MR. STERN: Sorry, Judge.

9 THE COURT: No. Okay. I think Mr. Wittie said yes.
10 Okay.

11 MR. ERICKSON: Your Honor, just so it's clear, we'll
12 communicate that to Mr. Mason and we'll meet the February 1
13 deadline.

14 THE COURT: Good. Thank you. Thank you.

15 MR. STERN: And just for the record, it may be that
16 Mr. Mason determines, unlike Mr. Campbell, that he has no
17 intention on opening on the report and the issue would be
18 deferred until such time as LAN intended to use the report.
19 He's not obligated to send something to the extent he wasn't
20 going to open it.

21 THE COURT: Right. We'll, I'd still like to know if
22 he's not going to do it in his opening just tell me and I'll
23 check that off my to do list. Okay.

24 Let me see if Jeseca is okay. Jeseca, do you need a
25 break? We have two more here.

January 19, 2022

97

1 MADAM COURT REPORTER: I'm fine, Judge.

2 THE COURT: Now we're up to 508 and 513, which are
3 plaintiffs' motion to exclude evidence about alternative lead
4 exposures that are not supported by expert testimony.

5 MR. STERN: This will be me again, Your Honor.

6 THE COURT: Okay.

7 MR. STERN: Your Honor, primarily evidence of other
8 lead exposures and frankly of alternative theories of
9 causations shouldn't be permitted in the trial unless they're
10 supported by expert testimony.

11 The reply briefs made clear that, you know -- our
12 reply brief makes clear that we're taking aim at the
13 information not supported by expert testimony, not the experts
14 themselves. VNA's and on some level LAN's responsive
15 pleadings insinuated if not outright stated that we're trying
16 the get rid of their experts. We're not.

17 VNA's experts don't actually opine that there are
18 other lead exposures which are more likely than not to have
19 caused plaintiffs' injuries. The evidence is speculative. I
20 mean, generally speaking, VNA's evidence, to the extent it's
21 evidence, of alternate lead exposures and alternative causal
22 theories are speculative. They're not supported by any expert
23 testimony.

24 The best case that I think the Court should really
25 focus on is United States v Frank Iron Hawk. The facts

1 involved a child abuse situation and a head injury to a
2 toddler that could have been chronic and thus accidental or it
3 could have been acute and thus intentional and criminal.

4 So this is a criminal case where someone's rights are
5 at stake and it's a very heightened level of scrutiny. The
6 father of the child was the defendant and he had a doctor who
7 opined that there was a chronic injury involving a hematoma
8 and that a simple accidental fall caused a rebleed and the
9 seriousness of the injury.

10 There, the district court excluded it as to
11 speculative the evidence allegedly in support of the expert's
12 testimony of the steep and dangerous condition of the stairs
13 in the toddler's mother's apartment. And the Eighth Circuit
14 affirmed stating that the defendant was entitled to prove his
15 theory of a defense, including introducing evidence supporting
16 Dr. Fox's chronic injury theory.

17 However, he was not permitted to provide speculative
18 testimony which could only fit his theory under unreasonable
19 inferences. A nearby tenant, for instance, who would have
20 testified about the stairs never witnessed the toddler falling
21 down. Nor was a related injury ever reported to social
22 services.

23 Dr. Weed, who's one of the defendant's experts here,
24 simply discusses the potential for alternative exposure
25 generally. He's a general causation expert who makes no

1 specific conclusions about plaintiffs' exposure to anything.
2 And Dr. Finley doesn't actually opine that the plaintiffs were
3 exposed to other lead sources or that those exposures caused
4 plaintiffs' injury.

5 There's no presumption of exposure under Michigan law
6 based on the mere fact of a toxin's existence in the
7 environment. At most, Dr. Finley is reasoning that
8 correlation equals causation. But that's also not valid under
9 Michigan law.

10 And I point the court to Bloomfield Hills Country
11 Club v Travelers Property Casualty. It's case number 15-11290
12 2016 US District Lexis 140449. It's an Eastern District of
13 Michigan case that quotes Craig v Oakwood Hospital, which is
14 471 Mich 67 at 93. There's just a lack of --

15 THE COURT: Mr. Stern, just a second. Are you
16 challenging the admissibility of general causation testimony
17 on relevance grounds? What is the basis of your challenge?

18 MR. STERN: Well, there's no specific causation in
19 this case.

20 THE COURT: Right.

21 MR. STERN: Because no one's opining that. In fact,
22 all four of defendants' experts on this point say that the
23 kids aren't hurt at all.

24 So to introduce evidence of general causation or soil
25 , paint, etcetera, would be extremely prejudicial versus

1 probative under Rule 403 in light of the fact that these very
2 same experts who might float the idea of this type of exposure
3 have simultaneously during their deposition testimony stated
4 that not one of them believes the children were actually
5 harmed.

6 So it's a combination of both the admissibility of
7 the evidence mostly based on Rule 403 and the prejudicial
8 effect based on all of the other testimony that each of these
9 witnesses gives.

10 THE COURT: Okay. Can you separate your argument out
11 so the psychologists are off to one side and Weed and Finley
12 are separate? Or are you combining this all?

13 MR. STERN: They're all combined, Your Honor, because
14 not one of them actually has opined that, you know, Emir
15 Sherrod is, in fact, injured but the cause of his injury is
16 from lead in his home. Or Daylaana Ware is, in fact, injured
17 but the cause of her injury is from a terrible birth and
18 delivery that occurred with her mom and she got an Apgar score
19 of 3.

20 And so it's one thing for an expert to come in and
21 say, hey, there's a lot of different causes of developmental
22 delays. There's a lot of different causes of neurocognitive
23 deficits. And some of those causes are lead poisoning based
24 on an exposure to lead in dirt or lead exposure based on lead
25 in paint or a medical issue that occurred during the birth of

1 the child or autism or some other medical condition.

2 But in this particular case, there is not one opinion
3 provided by a single expert, whether it's a general causation
4 like Dr. Finley or a specific causation expert like Dr. Weed
5 where anyone opines to a reasonable degree of medical
6 certainty, A, this child's injury was caused by blank. Or B,
7 this child's lead poisoning was caused by something other than
8 the water.

9 THE COURT: Okay. Let me ask you, what is the relief
10 you're seeking with respect to Weed and Finley in this motion?
11 Because I understood Weed and Finley to have general testimony
12 that shows that the lead measures in these children are
13 unremarkable.

14 MR. STERN: Certainly, certainly Dr. Weed and
15 Dr. Finley can provide an opinion that the lead measurements
16 in these children are unremarkable. We're not trying to
17 exclude their opinions, which are based in science and their
18 own experience. But to then take it a step further and talk
19 about, well, mama moved to Minnesota for a bunch of years and
20 daddy's a deadbeat and smokes crack and it's noteworthy to me
21 --

22 THE COURT: Oh, no. That's a separate issue. But so
23 the relief -- but that's not what Weed and Finley are
24 testifying. We've got Putnam -- we've got other people saying
25 all of that.

January 19, 2022

102

1 MR. STERN: Sure, sure.

2 THE COURT: So let's just focus on -- I don't
3 understand entirely what the relief is you're seeking with
4 respect to Weed and Finley.

5 MR. STERN: Weed and Finley and any of the other
6 experts should not be able to testify to the extent that if --
7 let me start over.

8 THE COURT: Okay.

9 MR. STERN: These -- this child, child A, child B,
10 child C, child D, suffers from cognitive deficits that may
11 have been caused by exposure to soil, that may have been
12 caused by exposure to paint. Because, A, they don't believe
13 the child is suffering from any cognitive deficits. It's
14 contrary to their opinions.

15 And B, as we know from defendants' arguments about
16 Dr. Krishnan and Dr. Bithoney, there's magic words that the
17 defendants and Michigan law insist these doctors say and state
18 an opinion to, and none not one has stated --

19 THE COURT: Okay. So from your perspective, can Weed
20 and Finley testify that the blood lead levels as opposed to
21 the injuries or poisoning, that these children have could be
22 caused by ordinary background exposure? That's okay for them
23 -- you have your expert to say , no, that's not how it
24 happened but ...

25 MR. STERN: They are clearly from a generalist

1 standpoint to say could be. But not one of them has said to a
2 reasonable degree of medical certainty they have. And so by
3 permitting them without that testimony to say they could be is
4 prejudicial to the plaintiffs. It's throwing paint at the
5 wall in a way -- in a way that is far more prejudicial than it
6 is probative.

7 It would be one thing for one of these experts to say
8 it could be caused by blank and based on my review of the
9 records from the school, of the home inspection that VNA done
10 -- did, based on my personal defense medical examination of
11 this child -- which none of the defendants' experts actually
12 took the opportunity to do -- I believe to a reasonable degree
13 of medical certainty that this was, in fact, the cause more
14 likely than not.

15 And because they don't say that, to say the other
16 stuff without actually supporting it with an opinion that
17 that's what happened is far more prejudicial than it is
18 probative --

19 THE COURT: So if I limit Weed and Finley to
20 testimony that is rebuttal, general rebuttal of Bithoney,
21 Graziano, and Michaels, that's okay. But they can't take the
22 additional step in your argument of saying and that is exactly
23 what happened to these children.

24 MR. STERN: I don't even think, Your Honor, that they
25 can rebut with speculative causation. They can --

1 THE COURT: Because I think they're saying that the
2 lead in these children is unremarkable and is not lead
3 poisoning because it's just consistent with the background
4 lead that we all get exposed to.

5 MR. STERN: That is what they've testified to and
6 that is totally fine.

7 THE COURT: Okay. All right. So they can -- okay.
8 That's what I thought, but I wanted to make sure.

9 MR. STERN: There's a step that they're trying to
10 take it to that goes beyond that. And it's not only
11 contradictory to their testimony, I think it's unremarkable
12 and this job has -- there's nothing remarkable about this kid
13 because everyday as he walks through the world he is exposed
14 to lead and this is just the baseline amount.

15 Saying that and then saying but, however, if I'm
16 wrong, if the child actually does suffer from lead poisoning,
17 it's because of the soil potentially or it's because of the
18 paint potentially when, in fact, there's not a single opinion
19 in this case from plaintiffs' experts or defendant's experts
20 that indicate that the cause of the potential lead poisoning
21 is anything other than the water.

22 THE COURT: Okay. Let me go back.

23 In your brief, I think it's important to note that
24 the plaintiffs have the burden on specific causation and
25 differential diagnoses with respect to your clients. The

January 19, 2022

105

1 defendants don't have those same burdens. So I think that
2 needs to be clarified with respect to this motion.

3 MR. STERN: Sure.

4 THE COURT: So VNA's experts -- and let's just talk
5 about Weed and Finley right now -- still need to meet the
6 general evidentiary requirements that all experts face through
7 Rule 702 and Daubert. So but they're not required to make a
8 differential diagnosis. That's your burden for your
9 plaintiffs.

10 MR. STERN: Sure. But --

11 THE COURT: Do we agree on that?

12 MR. STERN: I think what Your Honor is speaking to is
13 sort of a lower standard that would exist for a defendant in
14 this situation than the standard that's required of the
15 plaintiffs. But while that is true --

16 THE COURT: Well, it's not a lower standard under 702
17 and Daubert.

18 MR. STERN: Correct.

19 THE COURT: It's just that they don't have to meet
20 elements 1 and 2 in a toxic tort case of specific -- they're
21 not the ones proving specific causation and a differential
22 diagnosis.

23 MR. STERN: Absolutely. But there still can't be an
24 evidentiary free for all when it comes to just throwing
25 evidence at a jury. And so alternative cause theories have to

1 be rooted in at least some reliable evidence.

2 THE COURT: Exactly.

3 MR. STERN: And so where no expert supports an
4 alternative cause theory, that theory would be entirely
5 speculative. And any related evidence is therefore
6 irrelevant. That comes from Sowers v R.J. Reynolds Tobacco,
7 which is a Middle District of Florida case. It's obviously
8 not dispositive here, but it's at least instructive.

9 Secondly the lower threshold, to the extent we're not
10 talking about the standard that's the same, the 702 standard,
11 an expert can speak in terms of possible causes but there has
12 to be some causal opinion.

13 THE COURT: Okay.

14 MR. STERN: So for instance, when Dr. Finley says the
15 plaintiffs lead levels are consistent with ambient exposure,
16 I'm just using that as an example, that by definition is not a
17 causal opinion at all.

18 THE COURT: Okay.

19 MR. STERN: Whether it's possible or more likely than
20 not or otherwise.

21 THE COURT: All right. I get it now. And so let me
22 hear from defendants. But let me say this before turning,
23 which is that where I'm coming from is I think Weed and Finley
24 can testify that the blood lead in these children could be
25 caused by ordinary normal exposure. But they can't testify

1 that these children were, in fact, lead poisoned from sources
2 of lead that were not water -- not the water. Because they
3 don't -- that would be entirely speculative on their parts.
4 They have no knowledge of that.

5 So let's start there and hear from VNA.

6 MR. TER MOLEN: Thank you, your Honor. I'll address
7 these two motions.

8 So Your Honor I appreciate your efforts to clarify
9 what these motions are about. And just quickly I'd like to
10 note, Your Honor, that these motions -- that these two motions
11 each say that they're about one thing with in particular
12 excluding testimony of nonexpert basically testimony.

13 Unsupported nonexpert testimony. Both in their opening brief
14 and their reply brief. But then they go on and they focus
15 exactly on expert testimony, which obviously is what we've
16 heard today at argument. So a bit unusual in that context.

17 But let me take the briefs at face value first, Your
18 Honor, just so we can address this point. VNA certainly
19 agrees we are not going to offer any nonexpert testimony that
20 doesn't have a credible basis on any of these points, right.

21 THE COURT: Okay.

22 MR. TER MOLEN: So to echo plaintiffs' counsel
23 earlier in I guess what's turning into a somewhat long
24 afternoon. But to echo plaintiffs' counsel earlier, Your
25 Honor, I mean, I don't see a need for this motion. And I

January 19, 2022

108

1 think that that if aspect of it is really --

2 THE COURT: I see a need for the motion. So it's
3 helpful to me.

4 MR. TER MOLEN: Sure. And then let me switch gears
5 to the expert aspect of it, Your Honor, which what you -- I
6 wanted --

7 THE COURT: Right.

8 MR. TER MOLEN: -- which is how the motion is styled.
9 Now let me turn to the expert part, which I understand and
10 appreciate Your Honor raising. And first of all, I completely
11 agree with how Your Honor has articulated the -- what the
12 burden of proof here is. Right.

13 I mean, plaintiffs bear the burden of proving in this
14 case that these plaintiffs were exposed to lead from drinking
15 water in Flint. And in VNA's case they have to establish that
16 proof after VNA's involvement. And then they similarly have
17 to show that these plaintiffs were injured by that exposure to
18 the lead in the water that they consumed. Right.

19 And so it's not defendant's burden here to show that
20 it's more probable than not that plaintiffs did not -- were
21 not exposed or were not injured. Rather it's our ability is
22 that Your Honor has highlighted I know to highlight the fact
23 that, well, there are other explanations for exposure to lead
24 other than water and other explanations for injury to the
25 extent that the jury concludes injury occurred other than

January 19, 2022

109

1 exposure to lead. Right.

2 THE COURT: Correct. I agree with you.

3 MR. TER MOLEN: And so -- yes. Thank you.

4 And so to hit your point directly, I think your
5 question directly on Dr. Finley, I believe that Your Honor has
6 it correct. I do want to be clear that in his report,
7 focusing on Dr. Finley, that Dr. Finley walks through for each
8 plaintiff the exposure scenario for each plaintiff and --

9 THE COURT: He walks through potential exposure
10 scenarios that he knows nothing about in there are actual
11 situation. So do you agree that he will not testify that
12 plaintiffs were, in fact, exposed to other sources of lead?

13 MR. TER MOLEN: I agree that he will not testify that
14 they were, in fact, exposed to other sources of lead. He will
15 testify that there were sources of -- well, let me back up a
16 bit, Your Honor. I'm sorry. I have to disagree with that on
17 at least one front, Your Honor.

18 I believe during the Daubert hearings we discussed at
19 least one of the plaintiffs had a blood lead test that came
20 back positive before the water source switch. So in that
21 context, Your Honor, I believe that it certainly is clear that
22 the plaintiffs were exposed, that that plaintiff -- and I
23 believe it's Teed but I may be mistaken, Your Honor -- was
24 exposed to other sources of lead.

25 And Your Honor, just so we're all clear here, it's

January 19, 2022

110

1 the plaintiffs' own expert, Dr. Graziano, testified that every
2 child in Flint had a positive blood lead level before the
3 Flint water source switch. So I do think it's fair and
4 appropriate to testify and for Dr. Finley to testify that
5 every child in Flint, similar to what plaintiffs testified --
6 plaintiffs' experts testified to --

7 THE COURT: I think that's Graziano. I think that's
8 correct. So and Mr. Stern, do you disagree about Teed that
9 the --

10 MR. STERN: I do.

11 THE COURT: -- the record reflects that there was an
12 earlier blood test?

13 MR. STERN: I do disagree.

14 THE COURT: Tell me about that.

15 MR. STERN: I disagree because Dr. Finley states
16 there's nothing wrong with Teed. And he hasn't stated that to
17 a degree of medical certainty any problems associated with the
18 child Teed were caused by exposure to lead in paint.

19 There could be -- there could be a thousand reasons
20 why someone is exposed. And obviously they are going to be
21 permitted, the defendants, to present evidence to the jury of
22 a prior lead level. That's in the medical records. It was
23 produced by us. And there's going to have to be an
24 explanation for that by our parents of the child, potentially
25 by Dr. Bithoney who addressed it in his report.

January 19, 2022

111

1 But experts can't just come in and suddenly give
2 opinions that they previously didn't give. I mean, that's --
3 I don't want to get into the Dr. Finley report that is the
4 subject of what we'll discuss at some point after this
5 argument.

6 But just because Dr. Finley recognizes that a child
7 had a blood lead level at some prior time doesn't mean that he
8 has such -- that he has attributed to a reasonable degree of
9 medical certainty that blood lead level to something else.
10 Nor has he said to a reasonable degree of medical certainty
11 that the deficits and the cognitive issues and the
12 neuropsychological issues that Dr. Krishnan unanimous has
13 discussed can be attributed to exposure to lead in paint.

14 And so it's one thing to bring in evidence that the
15 child had a previous exposure and then have the defendants
16 argue that any damage that may have been caused to this child
17 were not the result of a later exposure but an earlier
18 exposure.

19 But they need expert testimony for that. Just like
20 we need expert testimony. And that's not because the burden
21 is as high on them as it is on us. It's because the
22 prejudicial effect of allowing experts to just walk in and
23 make suppositions to a jury about, well, there's some paint
24 that had some lead and there's some soil that had some lead
25 and I saw a record where there was a lead level. So I'm not

1 saying the child's injured, but you should note, jury, that
2 all those things are true.

3 You need more than that. The evidence has to be
4 credible. And Dr. Finley didn't testify to that. Neither did
5 any of their other experts.

6 THE COURT: Okay. So here's -- from -- with respect
7 to this motion, these experts can testify as we discussed that
8 they believe that these blood lead levels are not remarkable
9 and could be caused by ordinary normal exposure. They cannot
10 testify that these plaintiffs were, in fact, exposed to other
11 sources other than factually somebody can point to the -- if
12 it's Teed then Teed's earlier blood test prior to April of
13 2014.

14 But they will not, yeah, not be allowed to testify
15 about other causes of a poisoning that essentially they don't
16 believe happened and so that's -- so that's with respect to
17 Weed and Finley. And that's motion in limine 513.

18 So let's move to 508, the psychologists. And here
19 VNA has four psychologists.

20 And I just at the outset want to understand what the
21 purpose is of four different experts on the same subject
22 matter. I just want to understand. I'm the one who's got to
23 manage this trial. I just want to know what we're doing
24 together and why.

25 So tell me why do we have four different

1 psychologists.

2 MR. TER MOLEN: Yes, Your Honor. Thank you. In part
3 it's because of the different ages of these plaintiffs. And
4 so in part it's because we have specialists in children who
5 are on the -- even though we're talking about younger children
6 here. We have at this point in time obviously they've gotten
7 older.

8 THE COURT: Okay.

9 MR. TER MOLEN: We have experts who are focused on
10 younger versus older I think is largely the explanation for
11 that, Your Honor.

12 THE COURT: Okay. That's helpful. And then here I
13 have to say that this was some difficult material to work
14 through. Because these experts are testifying -- for
15 instance, Dr. Putnam says there is no diagnosis that I'm
16 trying to attach to her family history. Yet he wants to
17 testify to events and circumstances of being raised by a
18 single mother that he thinks might lead -- might have led to
19 nothing apparently but maybe something.

20 So then I look at more prejudicial than probative
21 because what could it be probative of if she doesn't have a
22 condition. But he wants to testify about a biological father
23 who was in and out of jail, had substance abuse issues and
24 legal issues. And yet he says that the issue is that this
25 plaintiff has no neuropsychological mental health condition

1 that can be diagnosed. So it can't possibly be relevant that
2 she's raised by a single mother.

3 MR. TER MOLEN: If I may respond, Your Honor.

4 THE COURT: And also could be point to articles that
5 say that children raised by single mothers end up with
6 neurocognitive deficits?

7 MR. TER MOLEN: So Your Honor, what I'll -- again,
8 this motion, Your Honor, like the other motion, is unusual in
9 that it is also styled as being targeting nonexpert issues.
10 But again, you know, here we are. We're talking about expert
11 issues. And so it's odd and there's perhaps inadequate
12 briefing on that point.

13 But so, Your Honor, I think part of that may be the
14 disconnect at least with plaintiffs' counsel is that a number
15 of the -- these experts are all taking the well founded view
16 that these plaintiffs are not exhibiting unusual cognitive
17 deficits, right.

18 But in the alternative, they're raising possibilities
19 that in our view the plaintiffs need to address and their
20 experts need to address and Dr. Bithoney need to address in
21 his differential diagnosis as to, look, if plaintiffs are
22 going to contend that these plaintiffs are, in fact, injured,
23 then these are other possible causes of the same kind of issue
24 that plaintiffs are alleging or the plaintiffs' counsel are
25 alleging, plaintiffs' experts are alleging these plaintiffs

January 19, 2022

115

1 are suffering from. So in that -- that's the reason, Your
2 Honor.

3 And again, plaintiffs bear the burden of not only --
4 well, establishing it's more probable than not that they have
5 been injured because of exposure to lead in the drinking water
6 in Flint.

7 And so that includes -- to make that showing, that
8 includes in the cases we've cited including the Wilder, the
9 Allen, and the Acock (ph) cases, Your Honor, make it very
10 clear that to make a finding that something is more probable,
11 that a cause is more probable, that necessarily involves
12 ruling other possible causes out.

13 So these are well established experienced experts.
14 You know, plaintiffs made the decisions not to file Daubert
15 motions against any of them. So presumably they agree with
16 that. And these experts are identifying these alternative
17 causes as causes that to the extent that plaintiffs contend an
18 injury occurred, these causes need to be addressed and ruled
19 out.

20 MR. STERN: Your Honor, may I respond?

21 THE COURT: Certainly. But I have a question.

22 Mr. Ter Molen, do you have a case that stands for the
23 premise that an expert can testify to two entirely
24 contradictory theories in the alternative?

25 So we have these expert -- more than just Dr. Putnam.

January 19, 2022

116

1 We have others saying that no neurocognitive or other
2 impairment, also family history that they say is -- one of
3 them says is unflattering or something to that effect.

4 And so what is this -- do you have a case that says
5 one expert can testify in the alternative?

6 MR. TER MOLEN: Your Honor, if I may, what I'd like
7 to suggest is that we submit an additional brief on this. As
8 I've indicated, the briefing here, again, as plaintiffs styled
9 it as --

10 THE COURT: Yeah.

11 MR. TER MOLEN: We're not talking about experts. And
12 they repeated that in their reply. But here we are.

13 So if I may. And again, these are defense experts.
14 As I understand the schedule in this case, they're not going
15 to be taking the stand for some time. But we would certainly
16 be -- would like the opportunity, Your Honor, to submit a
17 brief on this and those and other issues Your Honor would like
18 us to address.

19 THE COURT: Well, there's only so much time that
20 everybody has to write and read and decide all these briefs.
21 But let's hold that -- let's just hold on to that. I
22 appreciate that. And I do understand that the title of these
23 motions and the content wasn't 100 percent copacetic one with
24 the other but ...

25 MR. STERN: Your Honor may I respond?

January 19, 2022

117

1 THE COURT: Go ahead. Sure.

2 MR. STERN: Two points. Mr. Ter Molen stated that
3 plaintiffs' counsel had a disconnect. I don't think there's
4 any disconnect. I think that the psychological experts that
5 have been proffered by the defendants are perfectly capable of
6 opining about the manner in which Dr. Krishnan performed her
7 test. Okay. That is totally fine.

8 I think the real disconnect here is from the
9 defendants who continuously seem to subtly at first and now
10 not so subtly proffer the opinion from experts that there's
11 nothing wrong with these kids other than they're from Flint,
12 other than they've got single parent, other than they've got a
13 dad on crack, other than they're poor, other than all of these
14 socioeconomic -- and frankly I'm the last one that ever raised
15 this -- but racial issues that no expert in this case for them
16 or for us has said is an alternative cause of something that
17 they say didn't even happen to the kids.

18 Secondly, Mr. Ter Molen mentions, you know, there
19 were Daubert hearings and obviously we agree with their
20 experts because we didn't file, you know, Daubert motions.
21 It's clear to me when the Daubert motions were filed they were
22 filed because the defendants completely disagreed with every
23 single thing that the defendants -- that our experts said.

24 But that's not why you file a Daubert motion. You
25 file a Daubert motion because you believe that there's not a

1 foundational basis for the person to give the testimony they
2 have not because you don't like their testimony.

3 In this case they're not going to require any more
4 briefing. There's not a single expert for the defendant who
5 says, A, Ms. Weed [sic] was injured very badly and suffers
6 from terrible cognitive deficits and that's because her dad
7 smoked crack. That's because her mom was on drugs while she
8 was in the womb.

9 They float these concepts as part of their testimony
10 and then recant them the minute they're cross-examined about
11 whether they actually believe that they caused any damage to
12 the children.

13 It would be had completely inconsistent to permit
14 them to testify this way. It would have no purpose whatsoever
15 other than to prejudice a jury. And in some ways it's
16 offensive at this point that they continue to put forward this
17 type of testimony.

18 THE COURT: Let me say this, which is -- just a
19 minute. The only reason it may be helpful to have some
20 further briefing is at least with respect to Dr. McCaffrey,
21 I'm not sure what testimony plaintiffs are suggesting is
22 objectionable with respect to that particular witness.

23 But in terms of the argument that some of these
24 arguments are more prejudicial than probative, they don't seem
25 to be probative of anything. All of the family circumstances

1 don't seem probative of anything that's at issue that your
2 experts are testifying to because they say the -- all four
3 plaintiffs have sorry impairments, zero problems, zero
4 consequences.

5 So it wouldn't be helpful to -- apparently zero
6 consequences also from the situation of the father going to
7 jail. You know, so it doesn't -- we don't need that
8 testimony. It just isn't relevant to our case.

9 Dr. Thompson, for example. Tell me, Mr. Ter Molen,
10 what does he cite to to explain the things he believes are
11 causal factors of something? That's where he discusses about
12 the uncle dying. Like one of the plaintiffs, I'm sorry, lost
13 an uncle and then suggests that that might be the cause of not
14 having a problem or maybe having a problem.

15 So tell me about Dr. Thompson and the uncle.

16 MR. TER MOLEN: Thank you, your Honor. As an initial
17 matter, Your Honor, it's unfortunate that we talked earlier in
18 the day about a motion in limine that was to stop lawyers from
19 commenting adversely on each other, agree that it was
20 unnecessary to issue an order to that effect, and now we have
21 plaintiffs' counsel who's, for whatever reason, you know,
22 raising this I think irrelevant smear on the arguments that
23 we're making.

24 And I would respectfully submit that that's
25 inappropriate and not needed or helpful here.

January 19, 2022

120

1 With respect to the direct question, Your Honor,
2 again Your Honor raised the question which is a fair question.
3 As lawyers, we're used to arguing in the alternative. Right.
4 We're used to --

5 THE COURT: Yeah. But I don't care about a lawyer.
6 Sometimes it's permitted under the law, arguing in the
7 alternative. Sometimes it's not. So what I need is a case
8 that tells me an expert can testify that there's no problem at
9 all and that a child has a single mother just to say it
10 because there's no problem.

11 So tell me about how that's permitted. I need a case
12 to authorize that testimony to come in.

13 MR. TER MOLEN: I appreciate that, Your Honor. And
14 what I would -- what I had asked was the opportunity to raise
15 that case with Your Honor and submit a point on that -- on
16 that -- submit a brief, additional, very short. I promise you
17 it will be very, very short brief on that topic.

18 And again, we had some, as I think Your Honor has
19 recognized, the briefs filed by plaintiffs here were making it
20 very clear on the one hand that they weren't about experts.
21 But then obviously now they are about experts. And so to the
22 extent that our briefing on that was deficient, I apologize.
23 But we will be happy to submit something on that as very
24 quickly.

25 THE COURT: Okay. So with respect to 513 I have

1 ruled on that. And for example, Dr. Finley mentions only 12
2 percent of adults in Flint possess a bachelor's degree or
3 higher. And 44.4 percent are living in poverty. And that
4 they are poor families and poor families tend to live in older
5 homes.

6 It doesn't matter. That's not relevant to our case.
7 What's relevant to our case is our four plaintiffs and the
8 homes they lived in. And we don't have testimony about lead
9 paint and so on or lead gasoline in the house or something of
10 that nature. So he simply can't -- it's not relevant to a
11 fact at issue in our case.

12 MR. TER MOLEN: I hear Your Honor. And I just want
13 to highlight and I apologize if I'm misunderstanding your
14 Honor but we do have investigation reports from each of the
15 plaintiffs' home. And so we are able to testify -- Dr. Finley
16 is able to testify about what was found in each plaintiffs'
17 home. But I understand what you're saying, Your Honor.

18 THE COURT: Okay.

19 MR. TER MOLEN: And again, just to raise this with
20 respect to the timing and the calendar here, we can certainly
21 review this before Dr. Finley takes the stand. If that's
22 helpful to Your Honor.

23 THE COURT: Okay. Okay. Let me look -- one last
24 thing on 513 is A.T.'s family had moved out of the home by the
25 time of the inspection and the inspection was done after the

January 19, 2022

122

1 home had suffered a fire. And so let me -- I don't know if
2 fire damage can change what -- I mean, if there was lead paint
3 deeply buried under five layers of non lead paint but a fire
4 somehow exposed that.

5 MR. TER MOLEN: Your Honor, that would be an
6 opportunity for cross-examination by plaintiffs' counsel.

7 MR. STERN: Respectfully, Your Honor, there's no --
8 there's no expert opinion in this case that A.T.'s injuries
9 were caused by exposure to lead in a home that had lead.
10 Forgetting even the fire. And so we don't need to brief this.
11 We don't need to -- I mean, there's no expert testimony that
12 attributes it to it. So the fire is a bit of a red herring.

13 THE COURT: Okay. In any event, Mr. Ter Molen, your
14 experts still have to have their conclusions and their sources
15 be reliable. And I'm not convinced that that inspection is
16 reliable if it took place that after she has moved out and
17 after a fire.

18 But in any event, did the inspection show that there
19 was lead sources in the house?

20 MR. TER MOLEN: It did, Your Honor.

21 THE COURT: Okay. And what were the sources?

22 MR. TER MOLEN: Your Honor, I believe it was lead
23 paint and some lead dust in the home and some lead in the soil
24 but I don't have that right in front of me, Your Honor.

25 THE COURT: Okay. I think the soil I recall, but I

1 don't -- and so I don't -- and there was ongoing remodeling
2 going on in the house at the time. That seems highly
3 speculative that the remodeling was not going on unless you
4 think that it was when the plaintiff was living there.

5 MR. TER MOLEN: Well again, Your Honor, we could
6 bring these points out on -- at trial. We can bring -- we can
7 review specifically this issue later since Dr. Finley won't be
8 taking the stand here for at least I would say three months
9 from now probably the earliest.

10 THE COURT: Well, let me say on 513 I'm confident
11 that you may not argue that you have evidence that plaintiffs'
12 exposure to lead was caused by soil or lead paint or lead
13 dust. And so we know that. There's no further briefings
14 needed because the experts don't tell us. They don't tell us
15 that. They don't provide that opinion.

16 And your experts can certainly tell us that
17 plaintiffs, from their perspective, were not exposed to
18 abnormal levels of lead and that their blood lead levels were
19 not abnormally high and are consistent with ordinary
20 background exposure. That's what the battle of experts is all
21 about.

22 But let me -- with respect to 508 and the various
23 psychologists, I would like to issue a written opinion. I
24 don't think that further briefing is necessary. But I think a
25 one to two-page bullet point summary of what you think and

1 what cases I should look at. That's what I would welcome with
2 both sides.

3 MR. STERN: And we agree -- and I'm not trying to be
4 a pain in the neck. But can we agree on font size and
5 spacing? Because a lot of times we do single page briefs.
6 And I do a letter, as the Court requires, and then certain
7 other parties will submit a no margin single spaced 11 point
8 brief and it's a little bit -- it's just not equal. And so
9 whatever it is is fine, but let's just do it equally so we're
10 all on the same footing.

11 THE COURT: Okay. Let's have two pages, 14 point
12 font, single spaced if you wish.

13 MR. STERN: Thank you.

14 MR. TER MOLEN: Thank you, your Honor.

15 THE COURT: And you don't have to have a case caption
16 or a signature. It can -- well, it does need a signature.
17 Okay. The signature can be on the last -- on a third page.

18 MR. STERN: This is with regard to the defense expert
19 neuropsychologists, correct?

20 THE COURT: Yes.

21 MR. STERN: Okay.

22 THE COURT: And what I really want to know is exactly
23 what testimony plaintiffs are objecting to for each.

24 MR. STERN: No problem.

25 THE COURT: Or is it all -- or are you suggesting

1 that all of it is more prejudicial than probative if they
2 don't have -- I mean, they obviously can testify that they
3 don't have any diagnosable condition. But all of this other
4 material about single parents and somebody's on crack cocaine,
5 etcetera.

6 MR. STERN: Happy to lay it all out for Your Honor
7 again, you know, if that's what Your Honor wishes. We think
8 that despite the styling of the motion, the relief sought
9 within it is pretty clear.

10 You know, we've had a number of instances today where
11 we thought we understood what a motion was. Like defendants,
12 the word "defendants", and then we found out at the oral
13 argument that it was actually a very specific thing about
14 referring in specific moments to defendants.

15 Our motion's clear what we were seeking, although it
16 could have potentially been styled better. But to the extent
17 there was a disconnect there, I apologize.

18 THE COURT: Okay. Okay. Good. So I think that
19 concludes the oral arguments on the motions in limine. And
20 what I'd like to do is take a break and then we have a number
21 of trial scheduling related issues to discuss.

22 I will ask my court reporter to attend that meeting
23 but not to begin by taking down a record. So that -- just
24 because there are just dates, times, things that just don't
25 require all of that.

January 19, 2022

126

1 MR. TER MOLEN: Your Honor, I apologize. Just so I'm
2 clear. So we'll have a discussion about trial. And then
3 later when we talk about issues like the Finley supplemental
4 report and the witnesses, we will have a record for those?

5 THE COURT: Yes.

6 MR. TER MOLEN: Thank you.

7 THE COURT: Okay. So let's take about a 5-minute
8 break. And then we'll be -- we'll discontinue the live
9 streaming because that's just not necessary to set dates and
10 discuss when you're submitting jury instructions and so on.
11 So good.

12 So we will be adjourned at this time. And in recess
13 we'll say, for about 5 minutes to 10 minutes. When you see me
14 and Jeseca turn our cameras on, you'll know that we're getting
15 ready to have our meeting. Thank you.

16 (Recess)

17 THE COURT: So we're back on the record in -- I guess
18 I can get used to saying this -- in the case of Sherrod, Teed,
19 Vanderhagen, and Ware vs VNA and LAN.

20 And we're on the issue of defendants' request that
21 plaintiffs -- well, that the Court strike witnesses that they
22 were not aware of on a previous witness list or from written
23 responses to interrogatories.

24 And what I have decided is that plaintiffs need to
25 further supplement the response to interrogatory number 5 that

January 19, 2022

127

1 specifically asks whether the witnesses will testify about
2 plaintiffs' drinking water usage. And that furthermore
3 reasonable efforts be undertaken to produce them for
4 depositions.

5 Ms. Devine, are you requesting depositions of all of
6 the witnesses?

7 MS. DEVINE: So I believe -- and Mr. Stern can
8 correct me if I'm wrong -- but the list was reduced to 11
9 witnesses from 26.

10 THE COURT: Oh, okay.

11 MS. DEVINE: And I think four of those are plaintiff,
12 plaintiff representatives themselves who have already been
13 deposed. So it is seven? Is that right, Corey?

14 MR. STERN: I have to check.

15 MS. DEVINE: Okay. So we would be seeking
16 depositions of all of those witnesses. I would ask the Court
17 to put some sort of time limits or deadlines on these just
18 because I feel like we're two weeks from when we last talked
19 about this. And I know Mr. Stern's making good effort. But
20 we know not a whole lot more over two weeks.

21 So to the extent he says he's in contact with these
22 people, I would ask that those interrogatories be supplemented
23 by Friday. And --

24 THE COURT: Well, I think what he said is that he's
25 having some difficulties contacting some of these witnesses.

January 19, 2022

128

1 They're not his clients.

2 MS. DEVINE: Okay.

3 THE COURT: So but what were you going to say? So I
4 think Friday doesn't seem reasonable to me if we're at 5:00 PM
5 eastern time on Wednesday. But go ahead.

6 MS. DEVINE: I would just point out, Your Honor, that
7 Mr. Stern said he was already in contact with some of these
8 people because they --

9 THE COURT: Yes.

10 MR. STERN: I'm --

11 MS. DEVINE: So I think those questions can be asked
12 of those witnesses and that information can be provided to us.
13 I understand there may be witnesses that Mr. Stern can't get
14 in contact with or is having more difficulty and we should be
15 just informed of that process.

16 I would ask that the depositions take place no later
17 than February 11. That's about three weeks. I know there's
18 seven or eight witnesses that need to be deposed. Some of
19 these may be in person. But we need time to be able to
20 process the information and respond to it in opening
21 statements and things like that.

22 THE COURT: Well, okay. Let me find out. Mr. Stern,
23 do you intend to refer to these witnesses' testimony in
24 opening statement?

25 MR. STERN: No.

January 19, 2022

129

1 THE COURT: I didn't think so because you don't know
2 what they're going to say.

3 MR. STERN: Your Honor --

4 THE COURT: So I don't see the urgency of February 11
5 in light of the other deadlines that are continually coming
6 up.

7 MR. CAMPBELL: Your Honor.

8 THE COURT: Yeah.

9 MR. CAMPBELL: I'm sorry to interrupt. But just on
10 that issue, we're dealing here with, you know, what could be
11 basic fact issues. And just something out of the blue. I
12 mean, if the residency of one of the -- or the particular
13 house where a child lived was in question. It's not.

14 But I mean if it was really important that the child
15 live at 20 Main Street and then we open on 20 Main Street and
16 it turns out that one of these witnesses comes two weeks after
17 we open the case and says, no, no. The child lived at 19 Main
18 Street, then that's a problem.

19 I mean, we need to have -- these are basic -- that's
20 part of this problem as to why this is so prejudicial to us.
21 This could change some very basic factual assumptions that
22 everyone's had.

23 MR. STERN: Well, in some instances it might be good.
24 I mean, if a parent certifies that the child lives at a
25 certain place and testified that they drank the water

January 19, 2022

130

1 continuously for three years and they never stopped and then
2 it turned out that they lied or misspoke about where their
3 address is, that would probably inure to VNA's benefit for
4 purpose of trial because it would show the credibility of the
5 witness was in question.

6 So it's not just necessarily prejudicial to VNA. I
7 understand the stakes that we're playing at. We have every
8 intention of getting it done as quickly as we can. And there
9 may come a point in time where Your Honor says it's too late.
10 You know, we haven't been able to get in touch with
11 Mr. Vanderhagen and he's not going to appear and it's just too
12 late. We've past that point.

13 But I'm committed to providing an update on Friday
14 with what we have. I'm committing -- committed to getting --
15 we are committing to getting the depositions scheduled as soon
16 as we're able to. I'm not -- I wish I knew what the
17 information was so I could tell everybody. And it could be
18 equally as bad or good for our side as it is for you or your
19 side. But we listed them, you know, and we'll provide that
20 information as quickly as we can.

21 THE COURT: Let's do this. There are seven
22 individuals. If by January 28 you can't provide supplemental
23 information about the nature of the testimony, then we'll have
24 to preclude them from trial. It won't matter what's in their
25 depositions. If you don't know about the 28th what general

January 19, 2022

131

1 areas they're going to testify to and whether it will be
2 related to their drinking of the water, then I think it is too
3 late.

4 So I think you have to supplement the interrogatories
5 by the 28th.

6 And then what I suggest is we're meeting on the 2nd.
7 I would then start to schedule -- I would currently schedule
8 any depositions that you can start to schedule of the
9 remaining seven. But if by the 28th there are some you've had
10 no contact with or can't provide information with, we'll
11 strike them from the list.

12 But if assuming by the 28th you do have all of that,
13 if there are individuals who are going to testify about water
14 usage or where the plaintiffs lived that would be different
15 from what VNA knows, then their depositions have to be done by
16 the 11th.

17 MR. STERN: Understood.

18 MS. DEVINE: Thank you, your Honor.

19 THE COURT: So now we have the Finley supplement
20 rebuttal issue. Just a second. Pardon me. Okay. Oh, my
21 God. You're trying to wear me out. Okay. Who's --

22 MR. TER MOLEN: I'd be happy to start, Your Honor.

23 THE COURT: Okay.

24 MR. TER MOLEN: So again, so Dr. Finley, in his
25 initial expert report, is he provided opinions that were

1 responding to and rebutting opinions with respect to how long
2 blood half life -- blood level half life was in children as
3 provided by Dr. Expect and Dr. Bithoney.

4 And then in the context of ongoing studies, we,
5 counsel, VNA counsel, became aware that there was out there an
6 ongoing -- apparently ongoing epidemiological study that
7 related to looking at effects of low level lead exposure on
8 children. And we --

9 THE COURT: When did you become aware of that report?

10 MR. TER MOLEN: So it's not a --

11 THE COURT: Or that study. That study.

12 MR. TER MOLEN: And just -- the study we became aware
13 of I would say maybe eight, nine months ago, Your Honor. I
14 may be off a little bit there. And then we initiated efforts
15 to get underlying data from that study.

16 Now interestingly enough, Dr. Lanphear, who, as you
17 may recall, is an expert for the class plaintiffs. Right.

18 THE COURT: I do.

19 MR. TER MOLEN: Had been the lead investigator for
20 that study. So we contacted class counsel. We tried to get
21 that information from doctor -- from them and Dr. Lanphear.
22 They declined to do that.

23 We then went to Dr. Yoltin (ph). Dr. Yoltin is the
24 researcher who took the titular head of the study, if you
25 will, after Dr. Lanphear for whatever reason stepped down from

1 that position. And she is a researcher at a university.

2 We reached out to her and then began a process of
3 negotiating with her counsel, university counsel, to obtain
4 that data. That data was just provided to us after back and
5 forth just before Christmas, Your Honor. I believe it was
6 December 22 or so.

7 So and that data came in the form -- I believe that
8 Mr. Stern provided some spreadsheets to the Court. The data
9 came to us in that form. So we then provided that data to
10 Dr. Finley and asked him for his thoughts on it.

11 And he was able, Your Honor, to look at that data.
12 And now for the first time given the underlying individual
13 information, he was able to calculate the half life -- the
14 blood level half life for approximately, Your Honor, 300 plus
15 children who had been followed over the course of years in
16 that -- in this study.

17 And that's information that had not been available
18 before and which therefore we put that together in his
19 supplemental report.

20 Now, there's a bit of a -- there's an add on layer
21 here, Your Honor, in that as time has gone on -- the study
22 that I'm talking about is called a longitudinal study. It
23 follows a number of children over years. And it began back in
24 I'm going to say 2010, 2011 thereabout, Your Honor. So it's
25 been ongoing for a while.

1 And over the course of years, different researchers
2 have published some aspects of that study. But they have not
3 disclosed underlying data. And so Mr. Stern --

4 THE COURT: Okay. Let me focus us in. Because what
5 I need to decide is whether this is a supplement or a
6 rebuttal. If it's rebuttal, it's untimely. And if it's a
7 supplement, I have a test I have to apply.

8 So let me first understand whether it's your position
9 that Dr. Finley's original report or supplemental report was
10 incomplete or inaccurate.

11 MR. TER MOLEN: So it was not incomplete or
12 inaccurate except in the sense that now we have additional
13 information which --

14 THE COURT: Right. And here's exactly what it was
15 looking like to me is that Dr. Finley wasn't incomplete or
16 inaccurate. So there's no correction needed to his original
17 report. He's just got more data now that is available to him
18 than he had at that time or more studies that he understands
19 the basis for and the data and so on.

20 And so it certainly sounds like a supplement to his
21 rebuttal report. So it's a supplement. And from my
22 perspective it's then untimely, unless you're telling me that
23 the original report was incomplete or inaccurate. And you're
24 not telling me that.

25 MR. TER MOLEN: Well, I am telling you, Your Honor,

January 19, 2022

135

1 that based on information we have now that wasn't available
2 earlier, his report was incomplete in the sense that it didn't
3 include that -- all of that data that's now available and that
4 I think is clearly new data.

5 And I would add, Your Honor, that this is an issue
6 where clearly, as you pointed out I think in your ruling on
7 the Richard Humann second supplement, right, that this is an
8 issue that has been raised. The blood lead level and the half
9 life has been an ongoing issue that's been litigated. And so
10 certainly even if Your Honor were to hold that this is not
11 new, it is -- we would contend and suggest as Your Honor found
12 in the Humann case that it is not prejudicial to allow this
13 now.

14 THE COURT: Okay. Hold on one second. I have a
15 contradictory meeting that I'm currently missing that I just
16 need to ...

17 (Pause In Proceedings)

18 THE COURT: I lost track of time. But I'll fix it.
19 I was to have a meeting. But I'll have it still. Okay.

20 So here's the issue is that the class plaintiffs had
21 what I thought was improper, untimely rebuttal. And I
22 excluded it. And you're aware of that. Dr. Humann or
23 Mr. Humann had some portions of his supplement that I
24 permitted and other portions that I did not.

25 And so the cases say you can't just continuously

1 supplement a report. There has to come a time when that --
2 when we've got a record in the case. I understand that you're
3 probably going to say, well, you're now letting Mr. Stern
4 bring these seven witnesses that we didn't know about.

5 But I think these are very different issues in that
6 those witnesses were apparently somewhat identified but not
7 through the interrogatories. But let's just set that aside.
8 Because what we're really on is the experts.

9 And so if it's a supplement saying we have to look at
10 these five Howe factors -- surprise to the party against whom
11 the evidence would be offered; ability of that party to cure
12 the surprise; the extent to which allowing the evidence would
13 disrupt the trial; the importance of the evidence; and the non
14 disclosing parties's explanation for its failure.

15 I totally understand your explanation, Mr. Ter Molen.
16 You have given a thorough and very reasonable explanation that
17 explains exactly why you disclosed it as soon as you had it
18 available. So I'm not concerned about that.

19 But I've read Mr. Stern's letter. So instead of
20 turning to him, he says not only -- he's shocked, surprised,
21 to put it mildly. And it's whether -- and it's not whether he
22 tells me he's surprised or shocked. But it is a lot of data
23 at 31 days or something before trial. And the ability of a
24 party to cure is essentially null.

25 I mean, I think this is such extensive data that it

1 would take much longer than between now and the beginning of
2 trial on the 15th to cure.

3 The extent to which allowing the evidence would
4 disrupt the trial. And it seems that it would absolutely
5 disrupt the trial because this is the material of opening
6 statements. The importance of the evidence. And here, that
7 really is an interesting factor here. Because this -- you
8 have evidence from Dr. Finley that contradicts plaintiffs'
9 evidence on half life as set forth by Bithoney and Specht.

10 So in some ways it seems cumulative so it's sort of
11 unimportant in that regard. But it takes this evidence to a
12 new level if I understand what the evidence is. And so it is
13 important. And I think from my perspective would be
14 disruptive.

15 So I think you've articulated that it's a supplement.
16 And so these Howe, H-O-W-E, factors apply. If it's rebuttal
17 then it's just -- it's too late under rebuttal. It's a
18 supplement to a rebuttal.

19 But so I don't know if Mr. Stern thinks there's
20 something more that needs to be said here.

21 MR. STERN: No, Your Honor. No, Your Honor.

22 THE COURT: Yes. Thank you. Just a minute. Okay.

23 So I think what we're going to do is exclude that
24 additional supplement that was 31 days before just under the
25 wire in terms of a supplement because I think it does not meet

January 19, 2022

138

1 the Howe factors.

2 And also, I'm not convinced entirely that it is a
3 proper supplement in the sense of correcting or further
4 explaining. But in any event, it will be excluded for those
5 reasons.

6 So is there anything else for us to discuss today?

7 MS. DEVINE: Your Honor, can I correct one thing I
8 stated on the new witness issue?

9 THE COURT: Sure.

10 MS. DEVINE: I had said there were seven witnesses
11 and I just went back and checked. It's 11 in total, not
12 seven. I don't think that changes anything, but I just wanted
13 to make sure that was corrected.

14 THE COURT: Okay. Thank you.

15 MS. DEVINE: Thank you.

16 THE COURT: The other thing I wanted to discuss --
17 and we can go off the record on this, Jeseca.

18 (Off The Record)

19 (Proceedings Concluded)

20 - - -

21

22

23

24

25

January 19, 2022

139

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Jeseca C. Eddington, Federal Official Court
Reporter, do hereby certify the foregoing 138 pages are a true
and correct transcript of the above entitled proceedings.

/s/ JESECA C. EDDINGTON
Jeseca C. Eddington, RDR, RMR, CRR, FCRR

1/21/2022
Date